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The Competency Conundrum: Problems Courts Have Faced in Applying Different Standards for Competency to Be Executed

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NOTES

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I. INTRODUCTION

*That he's mad, 'tis true: 'tis true 'tis pity,
And pity 'tis 'tis true.*

—William Shakespeare¹

Throughout Anglo-American legal history, there has been a general agreement, based on numerous rationales,² that mentally incompetent inmates should not be executed for their crimes.³ The recurring problem, however, is how to define "incompetence" or "insanity."⁴ Legislatures and courts have sought to provide a common-sense definition, but in practice judges must confront highly technical terminology from the ever evolving field of psychiatry.⁵ Additionally, the definition must be flexible enough to apply to a variety of cases, while being universal enough to assure that all defendants are treated fairly and equally.⁶

At hearings to determine a prisoner's competency to be executed, courts usually hear testimony from several qualified mental health experts, each offering his or her own version of an inmate's level of mental illness. In the end, however, judges must make the final determination of competency—a decision that literally decides an inmate's fate. Numerous articles and notes have addressed the general philosophical or moral problems with measuring competency to incur the death penalty.⁷ Some commentators view the

1. WILLIAM SHAKESPEARE, *HAMLET* act 2, sc. 2.

2. See *infra* Part II.B.

3. See, e.g., *State v. Allen*, 15 So. 2d 870, 871 (La. 1943); 4 WILLIAM BLACKSTONE, *COMMENTARIES* 24-25 (1769).

4. For a discussion of the distinction between the terms "incompetent" and "insane," see *infra* Part V.C.2.

5. See *infra* Part VI.A.

6. Although it is difficult to articulate, and outside the scope of this Note, there may be an equal protection problem with judges or juries applying the often vague definitions of incompetency differently to similarly situated defendants.

7. See, e.g., Rachele Deckert Dick, *Ford v. Wainwright: Warning—Sanity on Death Row May Be Hazardous to Your Health*, 47 LA. L. REV. 1351 (1987); Samuel J.M. Donnelly, *Capital Punishment: A Critique of the Political and Philosophical Thought Supporting the Justices' Positions*, 24 ST. MARY'S L.J. 1 (1992); Robert F. Schopp, *Wake Up and Die Right: The Rationale, Standard, and Jurisprudential Significance of the Competency to Face Execution Requirement*,

problem from the perspective of psychiatrists or psychologists; others consider specific problems such as drug-induced competency.⁸ This Note will approach the problem from a different perspective—that of the courts. By understanding the unenviable position in which current statutory and common law definitions place judges, it will become apparent that state legislatures, or perhaps the Supreme Court, need to provide more sensible standards for judges to use in determining competency to be executed.

Part II of this Note provides a brief explanation of the long-standing common law rule against executing the insane, as well as the traditional rationales for the rule. Additionally, Part II offers a summary of the Supreme Court's determination that the Eighth Amendment⁹ prohibits executing the insane, as set forth in *Ford v. Wainwright*.¹⁰ The plurality in *Ford* examined the procedural requirements for determining competency to be executed, but did not provide a proper definition of "competency" to be used in such proceedings.¹¹ Justice Powell's concurring opinion, on the other hand, found that the appropriate standard is whether the prisoner is aware of the punishment she is about to suffer and the reasons she is to suffer it. Finally, Part II provides a brief explanation of the American Bar Association's view that courts should also consider a prisoner's ability to assist counsel in her own defense.

Part III summarizes the current standards for measuring competency used in several key states, focusing on Florida, Tennessee, and Mississippi. The standards can generally be divided into two categories: the single-prong "cognitive" test, and the two-prong "assistance" test. Part IV then describes in detail three recent cases applying the various rules, all of which display the daunting task judges face in weighing conflicting expert testimony.

Part V of this Note discusses the numerous problems with these standards for measuring competency. The major concerns relate to defining when an execution is "imminent" so that a competency determination is appropriate, deciding which terminology to use in making this determination, and understanding the role of

51 LA. L. REV. 995 (1991); Rochelle Graff Salguero, Note, *Medical Ethics and Competency to Be Executed*, 96 YALE L.J. 167 (1986).

8. See, e.g., Keith Alan Byers, *Incompetency, Execution, and the Use of Antipsychotic Drugs*, 47 ARK. L. REV. 361 (1994); Barbara A. Ward, *Competency for Execution: Problems in Law and Psychiatry*, 14 FLA. ST. U. L. REV. 35 (1986); Rhonda K. Jenkins, Note, *Fit to Die: Drug-Induced Competency for the Purpose of Execution*, 20 S. ILL. U. L.J. 149 (1995).

9. U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

10. 477 U.S. 399, 410 (1986).

11. *Id.* at 418.

the judge in applying the testimony of mental health experts to the common language definition of competency provided in state statutes.

Finally, Part VI of this Note suggests that state legislatures need to be more meticulous with the exact language they use when defining "incompetency," specifically considering the language that expert witnesses will use. As a more uniform solution, this Note proposes that the Supreme Court complete what it initiated in *Ford v. Wainwright* by more specifically defining the applicable standard courts should use in determining a person's competency to face the death penalty.

II. THE RULE AGAINST EXECUTING THE INSANE

A. Common Law Rule

The rule against executing the insane has long been a part of Anglo-American jurisprudence. Sir Edward Coke¹² explained its origins in English common law: "By intendment of law the execution of the offender is for example . . . but so it is not when a mad man is executed, but should be a miserable spectacle, both against law, and of extream inhumanity and cruelty, and can be no example to others."¹³ Other origins of the rule focused on the notion that an insane person might be unable to make an argument that her execution should be stayed.¹⁴ American courts have consistently applied this rule,¹⁵ and commentators have defended its application.¹⁶

12. Sir Edward Coke was an extremely influential English judge who "knew more about the common law than any in or before his era." NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 301 (1997). His *Institutes* were an attempt at articulating the principles and procedures of the common law, mostly published posthumously. *Id.* at 302. It consisted of four volumes: property, statutes, criminal law, and courts of justice. See *BIOGRAPHICAL DICTIONARY OF THE COMMON LAW* 120 (A.W.B. Simpson ed., 1984).

13. EDWARD COKE, *THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND* 6 (London, E. & R. Brooke 1797); see 1 MATTHEW HALE, *PLEAS OF THE CROWN* 35 (London, Richard Tonson & Jacob Tonson 1678); 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 2 (Dublin, Eliz. Lynch 1788); Hawles, *Remarks on the Trial of Mr. Charles Bateman*, 11 How. St. Tr. 474, 477 (1685).

14. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* 864 (New York, Baker, Voorhis & Co. 1938) (1769) (arguing that if someone convicted of a capital offense after judgment "becomes of nonsane memory, execution shall be stayed; for peradventure, says the humanity of English law, had the prisoner been of sound memory, he might have alleged something in stay of judgment or execution").

15. See, e.g., *State v. Allen*, 15 So. 2d 870, 871 (La. 1943) ("One who has been convicted of a capital crime and sentenced to suffer the penalty of death, and who thereafter becomes insane, cannot be put to death while in that condition."); Daniel J. Broderick, Note, *Insanity of the Con-*

In the 1986 decision *Ford v. Wainwright*,¹⁷ the Supreme Court explicitly stated that the Eighth Amendment¹⁸ prohibits a state from inflicting the death penalty on a prisoner who is insane.¹⁹ To this day, no state allows the execution of someone determined to be insane.²⁰

This begs the question of how to define competency, especially since studies have shown that the pressures of sitting on death row result in a high degree of once sane inmates developing severe mental impairments.²¹ The situation has become more complex now that the rule against executing the insane has been extended to allow a person, found sane when convicted, to have her competency reassessed just prior to execution.²² Faced with such decisions, judges are in need of a well-crafted competency standard to use in their analysis of the prisoner's claims and the often-conflicting expert testimony.

B. Rationales for the Rule

There are generally six rationales used to justify the rule against executing an incompetent person.²³ These rationales were outlined by the Supreme Court in *Ford v. Wainwright*.²⁴

demned, 88 YALE L.J. 533 (1979) (discussing pre-*Ford* cases concerning execution of those deemed insane).

16. See, e.g., Schopp, *supra* note 7 at 997.

17. 477 U.S. 399 (1986); see *infra* Part II.C for a full discussion of *Ford*.

18. See *supra* note 9.

19. See *Ford*, 477 U.S. at 410. The Supreme Court had previously considered the constitutionality of the death penalty in general. See *Dobbert v. Florida*, 432 U.S. 282, 309 (1977) (distinguishing *Furman* to its facts, and finding that the death penalty was not unconstitutional if imposed properly); *Proffitt v. Florida*, 428 U.S. 242, 251 (1976) (holding Florida's procedures for imposing the death penalty were constitutional); *Gregg v. Georgia*, 428 U.S. 153, 196 (1976) (holding that Georgia's procedures for imposition of the death penalty, amended in response to *Furman*, did not involve cruel and unusual punishment); *Furman v. Georgia*, 408 U.S. 238, 239-40 (1972) (holding that, under the specific circumstances of the case, the imposition of the death penalty would violate the Eighth and Fourteenth Amendments).

20. See *infra* Part III.

21. See Byers, *supra* note 8, at 367-68.

22. *Ford*, 477 U.S. at 435 (1986) (Rehnquist, J., dissenting).

23. See SAMUEL JAN BRAKEL ET AL., *THE MENTALLY DISABLED AND THE LAW* 706 (3d ed. 1985); RALPH REISNER ET AL., *LAW AND THE MENTAL HEALTH SYSTEM: CIVIL AND CRIMINAL ASPECTS* 988 (3d ed. 1999); Byers, *supra* note 8, at 371-75; Schopp, *supra* note 7, at 998-1009; Ward, *supra* note 8, at 49-57. For additional rationales that have been suggested, such as tacit clemency, see Schopp, *supra* note 7, at 1004-05. For a discussion of the importance of tailoring the test for insanity to coincide with the rationale behind the rule, see Sanford M. Pastroff, *Eighth Amendment—The Constitutional Rights of the Insane on Death Row*, 77 J. CRIM. L. & CRIMINOLOGY 844, 864 (1986). For a discussion of the differing philosophical views of the Supreme Court Justices concerning the death penalty, see Donnelly, *supra* note 7.

24. 477 U.S. at 407-10.

The first rationale holds that madness is punishment enough in itself.²⁵ Commentators have criticized this rationale, however, because it logically means that an inmate's recovery subjects him or her to execution.²⁶ Rather, if madness were punishment enough unto itself, the prisoner's sentence would be commuted and he or she would be released upon recovery.²⁷ Furthermore, modern definitions of incompetency are not restricted to what traditionally was considered "madness."²⁸

The second rationale for not executing the insane is that imposing the death penalty on an incompetent person simply offends humanity in its cruelty.²⁹ This reasoning has been used for hundreds of years,³⁰ and closely resembles the Eighth Amendment's ban on cruel and unusual punishment.³¹ It is difficult, however, to separate this rationale from an argument against the death penalty in general.³²

The third justification for the rule is religious in nature, based on the notion that an incompetent person is unable to make peace with God, and therefore, should not have his or her life ended.³³ As the *Ford* Court stated: "[I]t is uncharitable to dispatch an offender 'into another world, when he is not of capacity to fit

25. *Id.* at 407-08 ("*furiosus solo furore punitur*") (citing BLACKSTONE, *supra* note 14, at 395); see also REISNER ET AL., *supra* note 23, at 988; Byers, *supra* note 8, at 372; Ward, *supra* note 8, at 50.

26. Ward, *supra* note 8, at 50.

27. Byers, *supra* note 8, at 373.

28. See *infra* note 83 and accompanying text. Insanity did not become a defense for criminal acts in England until the fourteenth century, and even then the authorities were very general in their terminology. See HENRY WEIHOFEN, *INSANITY AS A DEFENSE IN CRIMINAL LAW* 17 (1933). Early commentators merely argued that an "idiot" or "madman" did not know what they were doing, so they could not have the requisite felonious intent. *Id.* at 19. The seminal English case is *M'Naughten's Case*, which focused exclusively on cognitive disability and found a person insane if: (1) she does not know the nature and quality of the act she is doing; or (2) if she did know it, she did not know what she was doing was wrong. 10 Cl. & F. 200, 8 Eng. Rep. 718 (1843); see JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 319 (2d ed. 1995) (describing the *M'Naughten* test in detail). Subsequent general insanity rules have switched the focus to whether an act is the *product* of a mental defect or whether the person *appreciates* the nature of her conduct. DRESSLER, *supra*, at 322-24.

29. *Ford*, 477 U.S. at 407; see REISNER ET AL., *supra* note 23, at 988; Ward, *supra* note 8, 52.

30. See *supra* note 14 and accompanying text.

31. See *supra* note 9.

32. See Ward, *supra* note 8, at 52. For example, why is it cruel to execute someone who was sane when she committed the crime and sane when she stood trial and was convicted? Would the answer to that question also counsel against executing someone who remained sane through her execution? What if the person is competent but has an extremely low IQ? What if she was abused as a child? See *infra* Part V.

33. *Ford*, 477 U.S. at 407; see also REISNER ET AL., *supra* note 23, at 988; Byers, *supra* note 8, at 371; Ward, *supra* note 8, at 51.

himself for it.' ”³⁴ Even beyond the First Amendment’s prohibition against the establishment of religion,³⁵ however, there are numerous difficulties with basing a law in a pluralistic society on theological considerations.³⁶

The fourth rationale, taking a more modern tone, is based on the idea that an incompetent person might be unable to provide counsel with last minute information that would cause the court to vacate the sentence.³⁷ In explaining its standard for determining competency, the American Bar Association expressed a similar concern: that allowing the execution of an incompetent person would erode the integrity of the criminal justice system.³⁸ This rationale, however, has been criticized because an incompetent defendant has access to counsel who can make the necessary arguments on his or her behalf through numerous available avenues of appeal.³⁹ Furthermore, it is simply unlikely that a defendant after both a trial and sentencing might suddenly remember helpful information.⁴⁰

The fifth rationale argues that execution of an incompetent person would have no deterrent effect on the population because it provides no example to competent people in society.⁴¹ Assuming that the death penalty does have a deterrent effect, there is no reason why the execution of someone who committed the act while sane, but has since become incompetent, will not deter someone contemplating a similar crime.⁴² As one commentator observed: “Presumably, the condemned inmate’s incompetency would not

34. *Id.* (quoting Hawles, *supra* note 13, at 477).

35. U.S. CONST. amend. I (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . .”); see Byers, *supra* note 8, at 372.

36. See Ward, *supra* note 8, at 51 (citing LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 14-1 to 14-13 (1978 & Supp. 1979)). Barbara Ward notes that if this rationale were fundamental, then a prisoner’s realization of his moral guilt would need to be a component of any competency test, which it is not. *Id.*; see *infra* note 191 and accompanying text. In particular, such a requirement would preclude the execution of sociopaths. Ward, *supra* note 8, at 51. The underpinnings of this rationale seem to be based on a Christian idea of providing last rites for those about to die, a notion absent in many other religions. See Geoffrey Hazard & David Louisell, *Death, the State, and the Insane: Stay of Execution*, 9 UCLA L. REV. 381, 388 (1962).

37. Ward, *supra* note 8, at 56-57.

38. ABA STANDARDS FOR CRIMINAL JUSTICE 7-5.6 (2d ed. 1989) (“The rule rests less on sympathy for the sentenced convict than concern for the integrity of the criminal justice system.”).

39. *Ford*, 477 U.S. at 419 (Powell, J., concurring).

40. Ward, *supra* note 8, at 56-57.

41. *Ford*, 477 U.S. at 407; see also REISNER ET AL., *supra* note 23, at 988; Byers, *supra* note 8, at 373; Ward, *supra* note 8, at 51.

42. Ward, *supra* note 8, at 52 (“A person about to break the law cannot foresee that he will become insane after sentencing; rather, he relies on not being apprehended or does not care if he is apprehended. Thus, exempting an inmate who becomes insane after sentencing should not substantially dilute the deterrent effect of the death penalty, and life would not be taken unnecessarily.” (citing Hazard & Louisell, *supra* note 36, at 385)).

negatively affect the *public's* awareness and understanding that the condemned inmate is being executed for the commission of a capital offense."⁴³

Finally, the sixth rationale for not imposing the death penalty on an incompetent person is that it does not serve the retributive purposes typically associated with the death penalty.⁴⁴ The *Ford* Court stated that "the community's quest for 'retribution'—the need to offset a criminal act by a punishment of equivalent 'moral quality'—is not served by execution of an insane person, which has a 'lesser value' than that of the crime for which he is to be punished."⁴⁵ If the inmate has no comprehension of why she is being put to death, then there can be no retributive value for society. This rationale, if accepted, is perhaps the most persuasive and explains why current standards require a comprehension by the inmate of what she has done and why she is being punished for it.⁴⁶

Regardless of which rationale, if any, remains persuasive, the rule is now ingrained in the American legal system and accepted almost universally. The *Ford* Court's holding was clear, that "[w]hether its aim be to protect the condemned from fear and pain without comfort of understanding, or to protect the dignity of society itself from the barbarity of exacting mindless vengeance, the restriction finds enforcement in the Eighth Amendment."⁴⁷

C. *Ford v. Wainwright*

In *Ford v. Wainwright*, the Supreme Court explicitly held that the Eighth Amendment prohibits the execution of insane inmates.⁴⁸ The *Ford* Court addressed the competence of a man con-

43. Roberta M. Harding, "Endgame": Competency and the Execution of Condemned Inmates—A Proposal to Satisfy the Eighth Amendment's Prohibition Against the Infliction of Cruel and Unusual Punishment, 14 ST. LOUIS U. PUB. L. REV. 105, 111 (1994) (emphasis added).

44. Ward, *supra* note 8, at 54 ("Retribution may be defined simply as 'the application of the pains of punishment to an offender who is morally guilty.'" (quoting H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 9 (1968))); see REISNER ET AL., *supra* note 23, at 988; Byers, *supra* note 8, at 374-75.

45. *Ford*, 477 U.S. at 408 (citing Hazard & Louisell, *supra* note 36, at 387).

46. Ward, *supra* note 8, at 56; Harding, *supra* note 43, at 111. See Eric M. Kniskern, *Does Ford v. Wainwright's Denial of Executions of the Insane Prohibit the State From Carrying Out Its Criminal Justice System?*, 26 S.U. L. REV. 171, 184 (1999) (explaining how vengeance, as distinct from retribution, supports the rule against executing the insane at the most basic human emotional level).

47. *Ford*, 477 U.S. at 410.

48. *Id.* at 409-10. For earlier Supreme Court discussions of death penalty and insanity, see *Caritativo v. California*, 357 U.S. 549 (1958); *Solesbee v. Balkcom*, 339 U.S. 9 (1950); and *Phyle v. Duffy*, 334 U.S. 431 (1948); *Noble's v. Georgia*, 168 U.S. 398 (1897).

victed of murder and sentenced to death in Florida.⁴⁹ After the governor of Florida found the inmate competent to be executed,⁵⁰ his attorney filed a petition for habeas corpus, challenging whether the statutory procedures Florida followed in determining the inmate's competency to be executed violated procedural due process.⁵¹ The Supreme Court found that the procedures did violate due process and remanded the case.⁵²

The Florida statute in question required a panel of three psychiatrists to examine the inmate and determine whether Ford had "the mental capacity to understand the nature of the death penalty and the reasons why it was imposed upon him."⁵³ The panel was then to report to the governor, who would make the final judgment of competency.⁵⁴ The Court did not consider whether Florida's definition of incompetency was appropriate; rather, it only examined the *procedures* required by the statute.⁵⁵ Petitioner Ford argued that the Eighth Amendment⁵⁶ and the Due Process Clause⁵⁷ required a formal evidentiary hearing be held to determine his competency.⁵⁸ Without requiring a full evidentiary hearing, the Court held that Florida's procedure failed to achieve even the minimal degree of reliability that is required to protect any constitutional interest.⁵⁹ The Court found three major deficiencies in the

49. 477 U.S. at 401. Although there was no contention that he was incompetent at trial or sentencing, after conviction, Ford manifested changes in behavior indicating a mental disorder. *Id.* at 402.

50. The inmate's attorney followed Florida statutory procedures for determining competency to be executed, but the governor found him competent. *Id.* at 404.

51. *Id.*

52. *Id.* at 418.

53. *Id.* at 403-04 (quoting FLA. STAT. § 922.07 (1985)). In this case, the three psychiatrists, although differing somewhat in their medical conclusion, all found that Ford met the statutory requirements for sanity. *Id.* at 404.

54. *Id.* The governor announced without explanation or statement that he would sign Ford's death warrant. *Id.*

55. *Id.* at 410.

56. See *supra* note 9.

57. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law."); U.S. CONST. amend. XIV ("No state shall . . . deprive any person of life, liberty, or property, without due process of law."). For a general discussion of the Due Process Clause, see GERALD GUNTHER & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW 432-51 (13th ed. 1997).

58. *Ford*, 477 U.S. at 404.

59. *Id.* at 413. The Court relied on *Townsend v. Sain*, which held that in a habeas corpus proceeding "a federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts." 372 U.S. 293, 312-13 (1963). The Court found: "[I]n this case, it is clear that no state court has issued any determination to which the presumption of correctness could be said to attach; indeed, no court played any role in the rejection of

Florida procedure: (1) its failure to include the prisoner in the truth-seeking process; (2) its denial of any opportunity to challenge the panel of state-appointed psychiatrists' opinions; and (3) the placement of the decision wholly within the executive branch.⁶⁰ Thus, the Florida statute, the Court held, did not have adequate procedural assurances of accuracy.⁶¹

Although the majority of the Court failed to develop an appropriate standard for determining competency,⁶² Justice Powell addressed this issue.⁶³ Despite his concurring in the judgment, Justice Powell asserted that Justice Marshall's majority opinion erred in seemingly requiring some sort of full scale "sanity trial."⁶⁴ Rather, Justice Powell emphasized that the inmate seeking a post-conviction finding of incompetence will have already been judged competent to stand trial and found guilty of the crime.⁶⁵ Since the subsequent claim of insanity is made against the background of these prior competency determinations, it would be proper for a state to presume the petitioner is competent and require a substantial threshold showing of insanity by the accused merely to trigger any hearing process.⁶⁶ After outlining the justifications for the rule against executing an incompetent inmate,⁶⁷ Justice Powell explicitly accepted the Florida competency standard: whether the prisoner is aware of the punishment she is about to suffer and why she is to suffer it.⁶⁸ Several states, he acknowledged, maintained a

petitioner's claim of insanity." *Ford*, 477 U.S. at 410. The Court thus remanded to the federal district court to grant a hearing de novo on that question. *Id.* at 411.

60. *See id.* at 413-16.

61. *Id.* at 418; cf. *Amaya-Ruiz v. Stewart*, 136 F. Supp. 2d 1014, 1031 (D. Ariz. 2001) (staying an execution because of an inadequate hearing).

62. Many commentators have criticized the Court for failing to identify a test for mental fitness to be executed. *See, e.g.*, Gordon L. Moore III, Comment, *Ford v. Wainwright: A Coda in the Executioner's Song*, 72 IOWA L. REV. 1461, 1470 (1987); Pastroff, *supra* note 23, at 866.

63. *Ford*, 477 U.S. at 418 (Powell, J., concurring).

64. *Id.* at 425.

65. *Id.* at 426.

66. *Id.* (citing *Ake v. Oklahoma*, 470 U.S. 68, 82-83 (1985)). Thus, the prisoner should properly bear the burden to show his or her incompetence to be executed. *Id.*; cf. *Scott v. Mitchell*, 250 F.3d 1011, 1014-15 (6th Cir. 2001) (holding that the burden on the prisoner is only to show probable cause for a hearing).

67. *See supra* Part II.B.

68. Justice Powell explained:

Such a standard appropriately defines the kind of mental deficiency that should trigger the Eighth Amendment prohibition. If the defendant perceives the connection between his crime and his punishment, the retributive goal of the criminal law is satisfied. And only if the defendant is aware that his death is approaching can he prepare himself for his passing. Accordingly, I would hold

broader definition of insanity whereby a defendant could not be executed unless he is able to assist in his own defense.⁶⁹ Although Justice Powell thought this "assistance prong" of a competency test was unnecessary because of recent expansions in both the right to counsel and the availability of federal and state collateral review,⁷⁰ he noted that "[s]tates are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum."⁷¹ The Court has apparently accepted Justice Powell's definition of competency to stand trial, although only in passing dicta.⁷² Furthermore, because Justice Powell represented the fifth and decisive vote in favor of the judgment, his opinion reflects the narrowest grounds for the Court's judgment, and is controlling on both the state and lower federal courts.⁷³

that the Eighth Amendment forbids the execution only of those who are unaware of the punishment they are about to suffer and why they are to suffer it. *Ford*, 477 U.S. at 422 (Powell, J. concurring).

69. *Id.* at 422 n.3.

70. The Sixth Circuit recently agreed with Justice Powell that, unlike at common law where the requirement of assisting counsel had more force, defendants in modern practice are afforded broader constitutional guarantees "including the right to effective assistance of counsel at trial and on appeal and extensive judicial review through direct appeal and state and federal collateral review. . . . We agree that a prisoner's ability to assist in his defense is not a necessary element to a determination of competency to be executed." *Coe v. Bell*, 209 F.3d 815, 825-26 (6th Cir. 2000).

71. *Ford*, 477 U.S. at 422 n.3 (Powell, J., concurring).

72. *Penry v. Lynaugh*, 492 U.S. 302, 333 (1989). The *Penry* Court mentioned Justice Powell's standard in only one sentence, because "[s]uch a case is not before us today." *Id.* The *Penry* Court held that the Eighth Amendment did not categorically prohibit the execution of the mentally retarded. *Id.* at 338-39. However, the Court recently overturned the jury instructions used in *Penry's* conviction. *Penry v. Johnson*, 121 S. Ct. 1910, 1924 (2001). The Court also noted that the Texas legislature was considering outlawing the execution of the mentally retarded. *Id.* The Court has also granted certiorari to hear the issue of the constitutionality of executing the mentally retarded. *McCarver v. North Carolina*, 121 S. Ct. 1401 (2001); see Linda Greenhouse, *Justices to Review Issue of Executing Retarded Killers*, N.Y. TIMES, March 27, 2001, at A1. The Sixth Circuit has held that the Supreme Court's decision in *McCarver* will not affect the issue of executing an insane inmate. *Scott v. Mitchell*, 250 F.3d 1011, 1013-14 (6th Cir. 2001). For a discussion of the issue of the mentally retarded and the death penalty, see Lyn Entzeroth, *Putting the Mentally Retarded Criminal Defendant to Death: Charting the Development of a National Consensus to Exempt the Mentally Retarded from the Death Penalty*, 52 ALA. L. REV. 911, 929 (2001) (noting that, since the first *Penry* decision, ten more states have banned executing the mentally retarded, bringing the total to twelve states); see also V. Stephen Cohen, *Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation*, 19 FLA. ST. U. L. REV. 457 (1991); David L. Rumley, *A License to Kill: The Categorical Exemption of the Mentally Retarded from the Death Penalty*, 24 ST. MARY'S L.J. 1299 (1993).

73. See *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, & Stevens, JJ.) ("Since five Justices wrote separately in support of the judgments in *Furman*, the holding of the Court may be viewed as the position taken by those Members who concurred in the judgment on the narrowest grounds."); see also *Scott*, 250 F.3d at 1013 (holding that the

Concurring in part and dissenting in part, Justice O'Connor agreed with Justice Rehnquist's dissent that the Eighth Amendment did not create a substantive right not to be executed while insane.⁷⁴ Justice O'Connor reasoned that society has a right to punish those validly convicted, and that requiring too much of a state in determining competency after a trial creates problems of false claims and deliberate delays.⁷⁵ She noted, however, that Florida law had created such a protected liberty interest; thus, some minimal procedural protections were required by due process.⁷⁶ Additionally, because under the majority's holding a prisoner has the right to suspend execution during a determination of incompetency, Justice O'Connor feared that this interest in competency, by definition, can never be conclusively and finally determined: an inmate can claim at the very moment of execution that she has become insane since the previous determination, no matter how recently it took place.⁷⁷

D. ABA Standards for Criminal Justice

In contrast to Justice Powell's opinion in *Ford*, the American Bar Association ("ABA") has suggested a much broader definition of competency. In its *Standards for Criminal Justice*, the ABA states that convicts who have been sentenced to death, but who are currently found to be mentally incompetent, should have their execution stayed.⁷⁸ The *ABA Standards* define competency in terms of

court was bound by *Ford* because neither the Supreme Court nor the Sixth Circuit had ever questioned its vitality).

74. *Ford*, 477 U.S. at 427 (O'Connor, J., dissenting). In his dissent, Justice Rehnquist argued that the power to grant post-conviction relief to a condemned prisoner should remain in the executive branch with the state's governor. *Id.* at 432 (Rehnquist, J., dissenting) (citing *Sollesbee v. Balkcom*, 339 U.S. 9 (1950)). He stated that adding an Eighth Amendment or Due Process Clause requirement that post-conviction competency to be executed be subject to "judicial review every time a convicted defendant suggested insanity would make the possibility of carrying out a sentence depend upon 'fecundity in making suggestion after suggestion of insanity.'" *Id.* at 433 (quoting *Nobles v. Georgia*, 168 U.S. 398, 405-06 (1897)).

75. Justice O'Connor argued:

But I consider it self-evident that once society has validly convicted an individual of a crime and therefore established its right to punish, the demands of due process are reduced accordingly. Moreover, the potential for false claims and deliberate delay in this context is obviously enormous. This potential is exacerbated by a unique feature of the prisoner's protected interest in suspending the execution of a death sentence during incompetency.

Id. at 429 (O'Connor, J., dissenting).

76. *Id.* at 427.

77. *Id.* at 429 (citations omitted).

78. ABA STANDARDS FOR CRIMINAL JUSTICE 7-5.6 (2d ed. 1989). The *ABA Standards* are, of course, not binding on courts, but are persuasive and often cited. *See, e.g., Rector v. Clark*, 923

whether the convict (1) can understand the nature of the pending proceedings, (2) can understand what he or she is being tried for, (3) can understand the reason for the punishment, (4) can understand the nature of the punishment, and (5) has sufficient capacity to recognize and convey to his or her attorney any fact which would make the punishment unjust or unlawful.⁷⁹ The main component of the *ABA Standards* not found in Justice Powell's definition of competency in *Ford* is the "assistance prong": whether the prisoner has the ability to assist counsel in his or her defense by recognizing and understanding any fact which might be relevant or exculpatory.⁸⁰ Several commentators have defended the inclusion of this "assistance prong," and historically it has been considered part of the determination of competency to be executed.⁸¹ Furthermore, Justice Marshall has suggested that there are strong arguments for including an assistance prong that Justice Powell erroneously overlooked in his *Ford* concurrence.⁸²

The ABA commentary also explains that it uses the term "incompetent," instead of the *Ford* Court's term "insane," to avoid confusion with the use of "insanity" in the criminal context to denote mental nonresponsibility and "beastlike derangement."⁸³ Addition-

F.2d 570, 572 (8th Cir. 1991) (holding that the ABA standards are interesting but have no legal effect).

79. ABA STANDARDS FOR CRIMINAL JUSTICE 7-5.6 (2d ed. 1989). The full definition of competency as outlined in the *ABA Standards* is as follows:

A convict is incompetent to be executed if, as a result of mental illness or mental retardation, the convict cannot understand the nature of the pending proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment. A convict is also incompetent if, as a result of mental illness or mental retardation, the convict lacks sufficient capacity to recognize or understand any fact which might exist which would make the punishment unjust or unlawful, or lacks the ability to convey such information to counsel or to the court.

Id. The ABA, in the commentary accompanying the *Standards*, notes that the language of this test was adapted from Justice Frankfurter's dissenting opinion in *Sollesbee v. Balkcom*. *Id.* at cmt.; see *Sollesbee v. Balkcom*, 339 U.S. 9, 24 (1950) (Frankfurter, J., dissenting) (stating that due process and the "self-respect of society" requires that a defendant "should not be denied the opportunity to inform the mind of the tribunal—be it a Governor, a board or a judge—that has to decide between life and death, not as a matter of grace but on the basis of law. For if he be insane his life cannot be forfeit except in violation of the law of the land.").

80. ABA STANDARDS FOR CRIMINAL JUSTICE 7-5.6 (2d ed. 1989).

81. See Harding, *supra* note 43, at 136.

82. *Rector v. Bryant*, 501 U.S. 1239, 1239 (1991) (Marshall, J., dissenting). The majority of the Court denied certiorari to hear the issue. *Id.*

83. ABA STANDARDS FOR CRIMINAL JUSTICE 7-5.6 cmt. (2d ed. 1989) ("The [American Bar] Association's Standards have already rejected the use of the term 'insanity' in its more customary context of the criminal defense of mental nonresponsibility. It was rejected, in part, because it 'conjure[s] up visions of beastlike derangement,' and because confusion results from its use in common language as a 'lay diagnosis.'").

ally, the ABA includes mental retardation, which often is not associated with the term "insane," in its definition of incompetence.⁸⁴ Finally, the ABA makes clear that its standard is meant to stay an execution for "any incompetence . . . not just incompetence that developed subsequent to sentencing . . . [because of] [t]he possibility of a defendant having a severe mental disability that was not detected or correctly evaluated at trial."⁸⁵ This notion is in direct opposition to Justice Powell's argument in *Ford* against including an "assistance prong" in the test for competency.⁸⁶

III. CURRENT STATES' STANDARDS

Rather than looking at every state's standard, this Note will discuss standards in a few states that are representative of typical state standards.⁸⁷ Generally, states have adopted standards resembling either Justice Powell's definition in *Ford* or the *ABA Standards*. Justice Powell's formulation of incompetency in *Ford* will be termed the "single-prong" test: whether the defendant understands why he or she was sentenced to death and comprehends this impending punishment.⁸⁸ The *ABA Standard* formulation will be termed the "two-prong" test: including both Justice Powell's "cognitive" prong and the "assistance prong" of being able to assist counsel in any future proceedings.

84. *Id.*; cf. *Penry*, *supra* note 72.

85. ABA STANDARDS FOR CRIMINAL JUSTICE 7-5.6 cmt. (2d ed. 1989).

86. See *supra* note 70 and accompanying text.

87. Several states simply have statutes that restrict executing incompetent inmates without specifically defining the term "incompetent" or "insane." See ALA. CODE § 15-16-23 (2000) ("insane"); CAL. PENAL CODE § 3703 (West 1999) ("insane"); CONN. GEN. STAT. § 54-101 (2000) ("insane"); DEL. CODE ANN. tit. 11, § 406(a) (2000) ("mentally ill after conviction and sentence"); KAN. STAT. ANN. § 22-4006(a) (2000) ("insane"); MASS. GEN. LAWS ANN. ch. 279, § 61 (West 2000) ("insane"); NEB. REV. STAT. § 29-2537 (1999) ("mentally incompetent"); NEV. REV. STAT. 176.445 (1999) ("sane"); N.M. STAT. ANN. § 31-14-6 (Michie 2000) ("insane"); OHIO REV. CODE ANN. § 2949.29 (West 2000) ("insane"); OKLA. STAT. ANN. tit. 22, § 1005 (West 1999) ("defendant under judgment of death has become insane"); R.I. GEN. LAWS § 40.1-5.3-7 (1999) ("mentally ill"); VA. CODE ANN. § 19.2-177.1 (Michie 2000) ("mentally ill"). Some of these states have subsequently had the terms defined by courts. See *infra* Part III.B. Other states have general "competent to proceed" standards that apply to death penalty cases. See COLO. REV. STAT. ANN. § 16-8-112 (West 2000) ("competent to proceed"); MONT. CODE ANN. § 46-14-221 (1999) ("fitness to proceed"); S.D. CODIFIED LAWS § 23A-27A-24 (Michie 2000) ("mentally incompetent to proceed"). Some states simply have statutes generally providing for the treatment of the mentally ill. See IND. CODE ANN. § 11-10-4-2 (Michie 2000) ("mentally ill"); N.J. STAT. ANN. § 30:4-27-2(r) (West 1999) ("mental illness"); S.C. CODE ANN. § 44-23-220 (Law. Co-op. 1999) ("mentally ill or mentally retarded"). Alaska, Hawaii, Maine, Michigan, Minnesota, North Dakota, Rhode Island, Vermont, West Virginia, and Wisconsin do not currently impose the death penalty.

88. 477 U.S. 399, 422 (1986) (Powell, J., concurring).

A. By Statute

1. Single-Prong Test

The majority of states that have statutorily defined competency to be executed have adopted definitions similar to Justice Powell's single-prong test.⁸⁹ Because it was the focus of the decision in *Ford v. Wainwright*, Florida's statute, and cases applying it, will be used as an example of such a statute. Florida law states, rather rhetorically, that "[a] person under sentence of death shall not be executed while insane to be executed."⁹⁰ Insanity with regard to undergoing execution is defined as lacking the mental capacity to understand the fact of the impending execution and the reason for it.⁹¹ Some states that have adopted similar standards use the term "incompetent" instead of "insane."⁹²

89. See ARIZ. STAT. ANN. § 13-4021(B) (West 2000) (" '[M]entally incompetent to be executed' means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death."); ARK. CODE ANN. § 16-90-506(d)(1) (Michie 1999) ("[T]here are reasonable grounds for believing that an individual under sentence of death is not competent, due to mental illness, to understand the nature and reasons for that punishment."); GA. CODE ANN. § 17-10-60 (2000) ("[T]he term 'mentally incompetent to be executed' means that because of a mental condition the person is presently unable to know why he or she is being punished and understand the nature of the punishment."); KY. REV. STAT. ANN. § 431.213(2) (Michie 2000) (" 'Insane' means the condemned person does not have the ability to understand: (a) That the person is about to be executed; and (b) Why the person is to be executed."); MD. CODE ANN., CORRECT. SERV. § 3-904(a)(2) (2000) (" 'Incompetent' means the state of mind of an inmate who, as a result of a mental disorder or mental retardation, lacks awareness: (i) of the fact of the inmate's impending execution; and (ii) that the inmate is to be executed for the crime of murder."); N.Y. CORRECT. LAW § 656(1) (McKinney 2001) ("An inmate is 'incompetent' when, as a result of mental disease or defect, he lacks the mental capacity to understand the nature and effect of the death penalty and why it is to be carried out."); TEX. CRIM. PROC. CODE ANN. § 46.04(h) (Vernon 2001) ("A defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed."); WYO. STAT. ANN. § 7-13-901(a)(v) (Michie 2000) (" 'Requisite mental capacity' means the ability to understand the nature of the death penalty and the reasons it was imposed.").

90. FLA. R. CRIM. P. R. 3.811(a).

91. *Id.* 3.811(b).

92. See, e.g., TEX. CRIM. PROC. CODE ANN. § 46.04(h) (Vernon 2001); *Ex parte Jordan*, 758 S.W.2d 250 (Tex. Crim. App. 1988).

2. Two-Prong Test

Two states, however, have statutorily adopted the broader two-prong test endorsed by the ABA.⁹³ In Mississippi, the statute defines a convict as "insane" if he or she does not have "sufficient intelligence to understand" the nature of the proceedings against him or her, what he or she was tried for and the purpose of the punishment, the impending fate awaiting, and "a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful and the intelligence requisite to convey such information to his attorneys or the court."⁹⁴ Similarly, Missouri law states that no person shall be condemned to death if, because of a mental illness or defect, he or she lacks the "capacity to understand" the nature and purpose of the punishment about to be imposed or "arguments for executive clemency or reasons why the sentence should not be carried out."⁹⁵ Additionally, two states have used the two-prong test in their general definitions of "incompetent to proceed," which are applied to death penalty cases as well.⁹⁶

B. By Common Law

In states that lack a statutory definition of incompetence to undergo the death penalty, courts have often provided a definition.⁹⁷ In *Van Tran v. State*,⁹⁸ the Tennessee Supreme Court

93. MISS. CODE ANN. § 99-19-57(2)(b) (2000); MO. ANN. STAT. § 552.060(1) (West 2000).

94. MISS. CODE ANN. § 99-19-57(2)(b) (2000); see *Johnson v. Cabana*, 818 F.2d 333, 339 (5th Cir. 1987); see also *infra* Part IV.C.

95. MO. ANN. STAT. § 552.060(1) (West 2000).

96. N.C. GEN. STAT. § 15A-1001(a) (1999) ("No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable. This condition is hereinafter referred to as 'incapacity to proceed.'"); UTAH CODE ANN. § 77-15-2 (2000) ("[A] person is incompetent to proceed if he is suffering from a mental disorder or mental retardation resulting either in: (1) his inability to have a rational and factual understanding of the proceedings against him or of the punishment specified for the offense charged; or (2) his inability to consult with his counsel and to participate in the proceedings against him with a reasonable degree of rational understanding.").

97. See, e.g., *In re Keaton*, 250 N.E.2d 901, 906 (Ohio Ct. App. 1969), *vacated in part*, 408 U.S. 936 (1972) (defining the Ohio standard as whether the prisoner has sufficient intelligence to understand the nature of the proceedings against him, what he was tried for, the purpose of his punishment, the impending fate that awaits him, a sufficient understanding to know any fact which might exist which would make his punishment unjust or unlawful, and the intelligence to convey such information to his attorney or the court). In some states, federal courts have provided the definition. See, e.g., *Magwood v. Smith*, 791 F.2d 1438, 1446 (11th Cir. 1986) (stating

adopted Justice Powell's "cognitive test" from *Ford*,⁹⁹ holding that, under Tennessee law, a prisoner is not competent to be executed if the prisoner lacks the mental capacity to understand the fact of the impending execution and the reason for it.¹⁰⁰

Conversely, in South Carolina, the state supreme court adopted the two-prong test after noting that the General Assembly had failed to define the level of competency required for execution.¹⁰¹ The court held that the first prong was whether an inmate can understand the nature of the proceedings, what he or she was tried for, the reason for the punishment, or the nature of the punishment.¹⁰² The second prong, according to the court, was the assistance prong: whether the prisoner possesses sufficient capacity or ability to communicate rationally with counsel.¹⁰³ The Supreme Court of Washington has similarly adopted the two-prong test, holding that "[w]hat is required is that they [the inmate] understand they have been sentenced to death for murder and be able to communicate rationally with counsel."¹⁰⁴ The Washington court limited the rule, however, by adding that "to be 'able to assist' in post-conviction proceedings, the defendants need not be able to think of new issues for counsel to raise, nor must they necessarily be able to recall the events surrounding the crime."¹⁰⁵

that because the Alabama legislature did not provide a standard for competency to be executed, the standard given for competency to stand trial would be used because it is "sufficiently analogous"; *Snider v. Cunningham*, 292 F.2d 683, 686 (4th Cir. 1961) (holding that section 19.2-177.1 of the Virginia Code provided an opportunity for a prisoner to show that he is so deficient in his faculties that it would be a denial of due process to execute him).

98. 6 S.W.3d 257, 266 (Tenn. 1999), *cert. denied*, 529 U.S. 1091 (2000).

99. See *supra* note 68 and accompanying text.

100. *Van Tran*, 6 S.W.3d at 266. But see *id.* at 275 (Birch, J., concurring and dissenting) ("Noticeably absent from this [majority] criterion is any reference to the prisoner's ability to assist counsel."). Note that some federal courts have similarly rejected the *ABA Standard* in favor of Justice Powell's test in *Ford*, even when the additional prong may have been determinative to the situation at hand. See, e.g., *Rector v. Clark*, 923 F.2d 570, 572 (8th Cir. 1991).

101. *Singleton v. State*, 437 S.E.2d 53, 58 (S.C. 1993); see S.C. CODE ANN. § 44-23-220 (Law. Co-op. 1999) (providing for treatment of the mentally ill, but not specifically dealing with inmates sentenced to death). The *Singleton* court cited several older cases adopting similar views. See *People v. Geary*, 131 N.E. 652 (Ill. 1921); *In re Grammar*, 178 N.W. 624 (Neb. 1920); *In re Smith*, 176 P. 819 (N.M. 1918).

102. *Singleton*, 437 S.E.2d at 58.

103. *Id.*

104. *Washington v. Harris*, 789 P.2d 60, 66 (Wash. 1990).

105. *Id.* The court did not describe exactly how the defendant *did* need to be "able to assist."

IV. APPLICATION OF THESE STANDARDS IN ACTUAL CASES

There are several problems with applying the standards adopted by the states. Some of these problems have been discussed by Justices or other judges, others asserted by commentators, and still others will be brought forth in this Note. In order to illustrate these problems, the factual backdrop of three specific cases will be discussed in this part of the Note, concentrating on three states that have recently decided the issue of competency to be executed.¹⁰⁶ After laying out the facts and outcomes of these decisions, Part V will discuss the problems individually, both in the abstract and by referring back to these case studies and other judicial decisions.

A. *Coe v. State*

In March 2000, the Supreme Court of Tennessee denied Robert Glen Coe's claim that he was incompetent to be executed.¹⁰⁷ Coe was convicted in 1981 of the aggravated rape, aggravated kidnapping, and first-degree murder of an eight-year-old girl.¹⁰⁸ Coe was sentenced to death, and the Tennessee Supreme Court affirmed the conviction.¹⁰⁹ Initially, the court found that the case was ripe because Coe's execution date was "imminent."¹¹⁰ Based on the single-prong "cognitive" standard set forth in *Van Tran v. State*,¹¹¹ the

106. This discussion will include state court decisions, as well as federal court reviews of those decisions. See *infra* Part IV.A. Under an application to a federal court for a writ of habeas corpus with respect to a judgment of a state court, the federal court will only grant the writ if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2) (1994). Thus, when a federal court is reviewing a state court's finding that a person is competent to be executed, substantial deference is given to the state court's ruling. For discussion on the issue of "second or successive" habeas corpus petitions under the Antiterrorism and Effective Death Penalty Act, see *Stewart v. Martinez-Villareal*, 523 U.S. 637, 639-46 (1998). But see Deborah L. Stahlkopf, Note, *A Dark Day for Habeas Corpus: Successive Petitions Under the Antiterrorism and Effective Death Penalty Act of 1996*, 40 ARIZ. L. REV. 1115, 1127-35 (1998) (arguing that there may be constitutional problems with the Act).

107. *Coe v. State*, 17 S.W.3d 193, 230 (Tenn.), cert. denied, 529 U.S. 1084 (2000). Coe's subsequent petition for writ of habeas corpus was denied at both the district and appellate levels. See *Coe v. Bell*, 209 F.3d 815, 828 (6th Cir. 2000); *Coe v. Bell*, 89 F. Supp. 2d 922, 944 (M.D. Tenn. 2000).

108. *Coe*, 17 S.W.3d at 199.

109. *State v. Coe*, 655 S.W.2d 903 (Tenn. 1983), cert. denied, 464 U.S. 1063 (1984).

110. *Coe*, 17 S.W.3d at 200. Coe's execution date was set for March 23, 2000, and the state supreme court's decision was filed on March 6, 2000. *Id.* at 193, 200.

111. 6 S.W.3d 257, 266 (Tenn. 1999).

court then reviewed whether Coe lacked the mental capacity to understand the fact of his impending execution and the reason for it.¹¹² The factual basis for the review was the competency hearing that had been ordered by the trial judge.¹¹³ The testimony of the four mental health experts appointed by the trial judge, two for each side, were discussed in detail in the opinion.¹¹⁴

Coe's first expert witness was James Ray Merikangas, M.D., whom the trial court accepted as an expert witness in the fields of neurology, neuropsychiatry, and psychiatry.¹¹⁵ Dr. Merikangas based his testimony on a review of appellant's records, a physical examination of the appellant, a magnetic resonance imaging (MRI) test revealing brain abnormalities, and a positron emission tomogram (PET) scan of appellant's brain.¹¹⁶ His personal contact with Coe consisted of a single visit for a total of ninety minutes.¹¹⁷ In Dr. Merikangas's opinion, Coe had congenital brain damage,¹¹⁸ maldevelopment, and probably some acquired brain damage.¹¹⁹ He diagnosed Coe as a chronic paranoid schizophrenic,¹²⁰ and found in his

112. *Id.*; see *supra* notes 98-100 and accompanying text.

113. *Coe*, 17 S.W.3d at 200. The standard for granting a competency hearing in Tennessee was set forth in *Van Tran*, 6 S.W.3d at 269. An inmate is required to make a threshold showing that her competency to be executed is at issue. *Id.* In *Coe v. State*, the state supreme court attached as an appendix the trial court's order describing the hearing and finding appellant competent to be executed. 17 S.W.3d 193. It should be noted that, consistent with Justice Powell's opinion in *Ford*, *Van Tran* requires appellant to bear the burden of proof on the issue of competency to be executed. See *supra* note 66 and accompanying text.

114. *Coe*, 17 S.W.3d at 200. The trial court also relied on the report of Dr. Herbert Meltzer that Coe was aware of his imminent execution and the nature of his crimes. *Id.* at 206. Finally, several lay witnesses testified as to specific instances of unusual conduct by Coe, though none offered an opinion as to his present mental competency to be executed. *Id.* at 206-07.

115. *Id.* at 200. Dr. Merikangas was a licensed physician, board certified in both psychiatry and neurology, as well as a lecturer in psychiatry at Yale University School of Medicine and practitioner of neuropsychiatry in Connecticut. *Id.* "Neurology" is "the science of the structure and functioning of the nervous system." J.P. CHAPLIN, *DICTIONARY OF PSYCHOLOGY* 302 (2d ed. 1985). "Neuropsychiatry" is "a medical specialty that deals with neurological and psychiatric disorders." *Id.* at 303. "Psychiatry" is "the specialized branch of medicine dealing with the diagnosis, treatment, and prevention of mental disorders." *Id.* at 362.

116. *Coe*, 17 S.W.3d at 201.

117. *Id.*

118. "Congenital brain damage" is brain damage which originated at the time of birth or during fetal development. CHAPLIN, *supra* note 115, at 99.

119. *Coe*, 17 S.W.3d at 201.

120. "Schizophrenia" is "a general name for a group of psychotic reactions characterized by withdrawal, disturbances in emotional and affective life, and depending on the type, the presence of hallucinations, delusions, negativistic behavior, and progressive deterioration." CHAPLIN, *supra* note 115, at 409. "Paranoid schizophrenia" is "a form of schizophrenia [sic] in which the chief symptom is delusions of persecution or of grandeur. There are also disturbances of thinking, hallucinations, and deterioration." *Id.* at 324. "Chronic" means "pertaining to diseases and mental disorders of slow onset and long duration." *Id.* at 81.

interview that Coe had delusions,¹²¹ hallucinations, peculiarities of thinking, and disorders of movement.¹²² According to Dr. Merikangas, Coe was not malingering,¹²³ and the conclusion by the state's mental health experts that Coe was malingering was based on "junk science."¹²⁴

Under the *Van Tran* single-prong standard, Dr. Merikangas admitted that Coe was "aware" that he was going to be executed and knew why he was sentenced to die.¹²⁵ However, he emphasized that, in his opinion, there is a distinction between "awareness" and "understanding," opining that appellant's belief that he would be reincarnated after death¹²⁶ demonstrated that he did not fully "understand" the consequence of death.¹²⁷ Thus, Dr. Merikangas found Coe incompetent to be executed.¹²⁸ Furthermore, in his opinion, Coe would become even less competent as the time of his execution drew near.¹²⁹ On cross-examination, Dr. Merikangas stated that he based his finding of incompetency on the fact that Coe was a paranoid schizophrenic, although he admitted that one could be schizophrenic and still be competent to be executed.¹³⁰

The second expert to testify on behalf of Coe was Dr. William Davis Kenner III, who was accepted by the trial court as an expert in the field of psychiatry.¹³¹ Dr. Kenner based his testimony on four

121. A "delusion" is "a false belief that cannot be modified by reasoning or a demonstration of facts." *Id.* at 120.

122. *Coe*, 17 S.W.3d at 201. For example, Dr. Merikangas noted Coe's decision to stay in his cell rather than exercise, his past "wild" conduct, his nicotine addiction, his tendency to drink a lot of coffee, and his paraphilia (tendency to masturbate in public). *Id.*

123. "Malingering" means "feigning illness or disability, usually for the purpose of escaping responsibility or unpleasant duty." CHAPLIN, *supra* note 115, at 265.

124. *Coe*, 17 S.W.3d at 201. By "junk science," Dr. Merikangas presumably meant that the methods used were not accurate or acceptable by the scientific community. On cross-examination, Dr. Merikangas admitted that Dr. Richard Rogers, one of the foremost experts in the United States on malingering, considers the tests that the state experts used as valid means for determining malingering. *Id.*

125. *Id.*

126. These beliefs were apparently based on those of writer and philosopher Edgar Cayce. *Id.* Dr. Daryl Bruce Matthews, an expert witness for the State, described Edgar Cayce as "a famous American prophet and fake healer who died in the nineteen forties, and who has written scores of books and sold millions of copies of said books." *Id.* at 240 n.66. Coe said that he had not based his ideas on Cayce, but that Cayce essentially echoed his views. *Id.* at 240.

127. *Id.* at 201.

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.* Dr. Kenner was licensed to practice medicine in Tennessee, employed on the clinical faculty at Vanderbilt University Medical School, and had a private general psychiatry practice. *Id.*

separate personal interviews.¹³² After the first visit, Dr. Kenner found Coe to be schizophrenic and incompetent.¹³³ After the second interview, however, Dr. Kenner found Coe competent because he was no longer exhibiting psychotic symptoms.¹³⁴ At the third interview, Coe did not remember the second visit, which had occurred the previous night.¹³⁵ Besides this memory loss, Coe told a story about his childhood completely inconsistent with the history he had given previously.¹³⁶ Furthermore, Coe became agitated when asked about the death penalty and asked to be returned to his cell.¹³⁷

Based on this third visit, Dr. Kenner began to suspect that Coe suffered from dissociative identity disorder ("DID").¹³⁸ At the fourth interview, Dr. Kenner discovered that another inmate had threatened Coe prior to the third interview, and concluded that the stress from this threat had caused the period of separate identity he had observed.¹³⁹ Dr. Kenner also diagnosed Coe as suffering from generalized anxiety disorder,¹⁴⁰ schizoaffective disorder (bipolar type¹⁴¹), poly-substance abuse, learning disorder, reading disorder, and schizoid personality disorder¹⁴² with antisocial features.¹⁴³ Dr.

132. *Id.* These interviews took place on December 22, 1999, and January 10, 11, and 12, 2000. *Id.*

133. *Id.* Dr. Kenner's sworn affidavit based on this first interview was the basis for the trial court's finding that Coe had made a threshold showing of incompetency, and thus was entitled to a competency hearing. *Id.*

134. *Id.* at 202. "Psychosis" is "a severe mental disorder characterized by disorganization of the thought processes, disturbances in emotionality, disorientation as to time, space, and person, and, in some cases, hallucinations and delusions." CHAPLIN, *supra* note 115, at 375.

135. *Coe*, 17 S.W.3d at 202. As the interview ended, Coe indicated that he was going to call his attorney to find out if the previous night's interview had actually taken place. *Id.*

136. *Id.* Neither the state supreme court's opinion nor the appendix containing the Criminal Court of Tennessee for the Thirteenth Judicial District's findings of fact describe this story or the previous one. Coe was apparently subjected to sexual abuse by his father. *See Coe v. Bell*, 89 F. Supp. 2d 922, 930 (M.D. Tenn. 2000).

137. *Coe*, 17 S.W.3d at 202.

138. *Id.* DID was previously known as multiple personality disorder. *Id.* According to Dr. Kenner, a person suffering from DID has both a primary and secondary identity. *Id.* When the secondary identity is manifested, it "has no awareness of the primary identity, any of the primary identity's past history, why he is on death row, what is about to happen to him, anything like that." *Id.* The trial court noted that Dr. Kenner did not explain how Coe's "secondary identity" was aware of the names of the attorneys representing his "primary identity." *Id.* at 203.

139. *Id.* at 202.

140. In psychology, "anxiety" means a "feeling of mingled dread and apprehension about the future without specific cause for the fear." CHAPLIN, *supra* note 115, at 31.

141. "Bipolar" means "having branches arising from both ends of a cell body, as bipolar neurons . . . [or] characterizing traits that can be expressed as opposites, such as dominance and submission." *Id.* at 56.

142. A "personality disorder" is "a difficulty in social adjustment that is not as serious as neurosis or psychosis but includes inadequacies in motivational and emotional processes." *Id.* at 334. "Schizoid" simply means pertaining to schizophrenia. *Id.* at 409.

Kenner also found Coe not to be malingering and questioned the effectiveness of the tests used by the state's experts to find that he was malingering.¹⁴⁴ Explaining the effect of DID on his diagnosis, Dr. Kenner explained that Coe's condition would vacillate depending on stress levels, so that he may be competent on a good day, but incompetent on a bad day.¹⁴⁵ In Dr. Kenner's opinion, to a reasonable degree of medical certainty, the stress from the approaching execution date would cause Coe to dissociate, rendering him incompetent to be executed.¹⁴⁶ On cross-examination, Dr. Kenner admitted that, at the time of his fourth interview, Coe was competent to be executed under the *Van Tran* single-prong standard.¹⁴⁷

The State's first expert witness was Daryl Bruce Matthews, M.D., Ph.D., whom the trial court accepted as an expert in the field of forensic psychiatry.¹⁴⁸ Dr. Matthews reviewed Coe's detailed psychiatric history and conducted a five-hour psychiatric evaluation of him.¹⁴⁹ Coe told Dr. Matthews that he knew the difference between life and death and believed he had a soul that would go somewhere after death.¹⁵⁰ After noting that Coe had already chosen a method of execution,¹⁵¹ Dr. Matthews recounted that when he asked Coe what happened upon a finding of incompetence, Coe said, "[T]hey give you drugs to make you well and then they kill you."¹⁵² Dr. Matthews concluded that Coe was aware of why he was convicted, although he minimized the seriousness of the offense and continued to profess his innocence.¹⁵³ Dr. Matthews diagnosed Coe as suffering from paraphilia,¹⁵⁴ poly-substance dependence in a controlled environ-

143. See *Coe*, 17 S.W.3d at 202. "Antisocial personality" means "a behavioral disorder characterized by truancy, delinquency, promiscuity, theft, vandalism, fighting, violation of common social rules, poor work record, impulsiveness, irrationality, aggressiveness, reckless behavior, and inability to plan ahead." CHAPLIN, *supra* note 115, at 31.

144. *Coe*, 17 S.W.3d at 202.

145. *Id.*

146. *Id.*

147. *Id.* at 203.

148. *Id.* Dr. Matthews was licensed to practice medicine in Hawaii and Arkansas, board certified in psychiatry and forensic psychiatry, and a clinical professor of psychiatry at Hawaii School of Medicine. *Id.*

149. *Id.*

150. *Id.*

151. Coe chose the method of lethal injection with a needle. *Id.*

152. *Id.*

153. Coe minimized the offense by stating that people get murdered all the time, and claimed that the crime was actually committed by a man named Donald Gant. *Id.* He further claimed that his confession had been coerced. *Id.*

154. See *supra* note 122.

ment, adjustment disorder¹⁵⁵ with mixed anxiety and depressed mood, nicotine dependence, malingering, possible neuroleptic-induced Parkinsonism,¹⁵⁶ noncompliance with medical treatment, antisocial personality disorder, borderline personality disorder, and schizotypal personality disorder.¹⁵⁷ After disagreeing with any diagnosis of Coe as schizophrenic or suffering from DID, Dr. Matthews found Coe competent to be executed under *Van Tran*.¹⁵⁸ On cross-examination, Dr. Matthews admitted that he had never treated a patient with DID, and that he was skeptical that the disorder existed at all.¹⁵⁹ Dr. Matthews also admitted that Coe could possibly become psychotic in the future.¹⁶⁰

The State's second expert, Daniel A. Martell, Ph.D., was accepted by the trial court as an expert in the field of psychology.¹⁶¹ Dr. Martell based his testimony on nine and one-half hours of interviewing and testing over two days, as well as a review of many documents pertaining to Coe.¹⁶² During the interview, Dr. Martell found Coe to be oriented to the world around him, able to describe accurately his own identity, location, and the month and year.¹⁶³ Dr. Martell also found that Coe expressed his thoughts coherently and logically, although he appeared paranoid at times.¹⁶⁴ Coe denied having visual hallucinations, but claimed to have experienced both auditory and olfactory hallucinations.¹⁶⁵ Dr. Martell found that Coe was malingering mental illness, based on some psychological tests

155. An "adjustment disorder" involves a problem with varying one's behavior in order to overcome a barrier and satisfy one's needs. CHAPLIN, *supra* note 115, at 12.

156. Neuroleptic-Induced Parkinsonism is a motor disorder that can be caused by particular medications used to treat mental disorders. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 792 (4th ed., rev. text 2000). "The essential feature of Neuroleptic-Induced Parkinsonism is the presence of parkinsonian signs or symptoms . . . that develop in associations with the use of neuroleptic medications." *Id.* Parkinson's disease is "a neurological disorder characterized by rigidity, tremor, and difficulty in controlling movements." CHAPLIN, *supra* note 115, at 325.

157. *Coe*, 17 S.W.3d at 203-04.

158. *Id.* at 204. In disputing the schizophrenia diagnosis, Dr. Matthews cited the lack of delusional thoughts and the diagnosis of Coe by Dr. Herbert Meltzer. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* Dr. Martell was licensed to practice psychology in New York and California and board certified in forensic psychology and neuropsychology. *Id.* "Psychology" is "the science of human and animal behavior; the study of the organism in all its variety and complexity as it responds to the flux and flow of the physical and social events that make up the environment." CHAPLIN, *supra* note 115, at 367. Compare this definition with that of "psychiatry." *Id.* at 362.

162. *Coe*, 17 S.W.3d at 204. Dr. Martell's testing took place on January 8 and 9, 2000. *Id.*

163. *Id.* Coe was not sure of the exact day of the month. *Id.*

164. *Id.*

165. *Id.* The distinction is between hallucinations pertaining to hearing (auditory) and those pertaining to the sense of smell (olfactory). See Chaplin, *supra* note 115, at 42, 313.

he administered.¹⁶⁶ In his opinion, Coe was competent to be executed under *Van Tran*.¹⁶⁷ He found that Coe understood he was going to die and knew the reason why he was sentenced to die, although he continued to profess his innocence.¹⁶⁸

Coe then called two rebuttal witnesses, Dr. John Pruett and Dr. James Walker.¹⁶⁹ Dr. Pruett was the attending physician at Riverbend Maximum Security Institution from 1994 to 1997 and had seen Coe every two or three months during that time.¹⁷⁰ Dr. Pruett testified that Dr. Kenner's observations of Coe's changes in behavior were consistent with DID, but did not offer his own opinion as to Coe's present mental competency to be executed.¹⁷¹ Dr. Walker was accepted as an expert in the field of forensic neuropsychology and had examined Coe over two days, giving the same battery of tests as Dr. Martell.¹⁷² Although the tests produced similar results, Dr. Walker did not find Coe to be malingering, especially because he took every available opportunity to deny he had any psychosis.¹⁷³ Dr. Walker would not diagnose Coe with DID, but recognized all of the other mental health experts' diagnoses as reasonable.¹⁷⁴ Although he refused to express an opinion about whether Coe met the *Van Tran* standard for competency,¹⁷⁵ he admitted that Coe was aware of his impending execution and why it had been imposed on him.¹⁷⁶ Dr. Walker disagreed with Dr. Kenner's assertion

166. *Coe*, 17 S.W.3d at 204. On cross-examination, the validity of those tests was attacked, and Dr. Martell admitted that some of the questions asked were not appropriate for a death row inmate, although he defended the outcome of the tests taken as a whole. *Id.*

167. *Id.*; see *supra* notes 98-100 and accompanying text.

168. *Coe*, 17 S.W.3d at 204-05. As part of the basis of this understanding, Dr. Martell noted that Coe chose lethal injection as the method of execution, and refused the prison official's offer to give him Valium to sedate him prior to execution, saying, "I think there might be a God, and I've got enough to deal with him, without being drunk on Valium." *Id.* at 205.

169. Dr. Pruett was board certified in psychiatry and licensed as a psychiatrist in Tennessee; Dr. Walker was a clinical assistant professor of neurology at Vanderbilt University School of Medicine and licensed to practice psychology in Tennessee. *Id.*

170. *Id.*

171. *Id.* Dr. Pruett also testified that DID is a legitimately recognized mental disorder, although he had only seen one patient with the disorder in the past. *Id.*

172. *Id.*

173. Dr. Walker found that Coe's exaggerations invalidated the tests, but that there was no requisite motivation to avoid execution and consciously lie to qualify for malingering. *Id.* at 205-06.

174. *Id.* at 206.

175. Dr. Walker would not make a diagnosis of competency to be executed because he stated that such a diagnosis was not his expertise. *Id.*

176. *Id.*

that Coe's mental state would deteriorate as the execution date approached.¹⁷⁷

Although he did not testify, Coe's own behavior at the competency hearing consisted of inappropriate comments to the judge¹⁷⁸ and other court personnel,¹⁷⁹ as well as generally disruptive behavior.¹⁸⁰ After screaming obscene and profane comments and threats in the courtroom and spitting at the Assistant Attorney General, Coe was gagged, and, when that proved ineffective, eventually removed from the courtroom.¹⁸¹ The trial judge noted that throughout these tirades, Coe was obviously aware of his situation, and even interjected his own logical and coherent responses to questions asked of witnesses.¹⁸² In particular, Coe repeatedly warned the trial judge that whatever he ruled would be overturned at the federal level, showing an awareness of his impending execution and legal situation.¹⁸³

After comparing the vastly different opinions of all of these expert witnesses, the Tennessee Supreme Court found that the evidence fully supported the trial court's finding that Coe was presently competent to be executed because he was aware of his impending death and the reasons for it.¹⁸⁴ The court affirmed the trial

177. *Id.*

178. For example, after Coe had banged on chairs with his hands, the court instructed bailiffs to place him in a chair made of softer material. *Id.* at 236. At that point, Coe told his attorneys, "Make a note of that. When we appeal it. Take his ass off that bench." *Id.* Then, Coe addressed the court, again banging on the chair, and said, "How do you like that? Can you hear that, Judge? Just happen to have one here I can beat on. How's that, Judge?" *Id.* Later, Coe told the court, "You'll regret bringing me down here you goddam Judge Judy want to be." *Id.* at 237.

179. The criminal court findings of fact described that Coe's screaming in the court room "consisted of obscenities and threats, directed at the Court, the court clerk, the capital case law clerk, the State's attorneys, the witness, and the court reporter." *Id.*

180. *Id.* at 207. The best example of this behavior occurred when Sergeant James W. Horton, a guard at Riverbend where Coe was housed, took the stand. When Sergeant Horton was questioned about his job, Coe shouted, "He wasn't a goddam thing. He was a whore." *Id.* at 237. Coe then told Sergeant Horton, "Just remember you got to be back at River Bend [sic] whore. You won't have all these gooddamn [sic] people protecting you [sic] ass up there, bitch . . . Don't be trying to hide, you punk . . ." *Id.*

181. *Id.* at 207. Once removed from the courtroom, Coe made no more outbursts. *Id.* at 239.

182. *Id.* at 207.

183. *Id.* Coe specifically claimed that "Judge Nixon is going to overturn anything that punk says," referring by name to the federal district court judge who had ten days earlier allowed Coe to pursue his competency to be executed claim in federal court after the conclusion of the state court hearing. *Id.*

184. *Id.* at 230. Justice Birch filed a dissenting opinion, disagreeing with Tennessee's competency standards under *Van Tran* and expressing his opinion that the Coe should be granted a stay of execution. *Id.* at 248-49 (Birch, J., dissenting). Justice Birch argued for inclusion of an assistance prong in the test for competency to be executed. *Id.* at 248.

court's decision, and directed the Warden of the Riverbend Maximum Security Institution to carry out Coe's execution.¹⁸⁵

B. Provenzano v. State

In May 2000, the Supreme Court of Florida decided *Provenzano v. State*,¹⁸⁶ affirming the circuit court's finding that Provenzano was competent to be executed under Florida's single-prong "cognitive test."¹⁸⁷ The circuit court had held an evidentiary hearing on Provenzano's competency to be executed, which was the basis of the appeal.¹⁸⁸ The court had found that Provenzano had a delusional belief that he was Jesus Christ and had "mental health problems of some degree."¹⁸⁹ Nevertheless, the Florida Supreme Court agreed with the circuit court that Provenzano "[did] not lack the mental capacity to understand the fact of his pending execution and the reason for it."¹⁹⁰ One justice dissented, noting that the circuit judge found that Provenzano did not rationally accept the reasons for his execution, but that such acceptance was not required for competency to be executed.¹⁹¹ The dissent noted that this case went further, however, because Provenzano's rejection of the reasons for his execution was based on a delusional belief.¹⁹² Provenzano was

185. *Id.* at 230. The court set the execution date for March 23, 2000. *Id.* This date was almost seventeen years after the original execution date set by the Tennessee Supreme Court the first time it considered Coe's conviction for murder. See *State v. Coe*, 655 S.W.2d 903, 913 (Tenn. 1983). Subsequent to the Tennessee Supreme Court's decision in March 2000, Coe filed an application for writ of habeas corpus in the United States District Court for the Middle District of Tennessee, which stayed the execution pending a ruling on the habeas claim. See *Coe v. Bell*, 89 F. Supp. 2d 922, 924 (M.D. Tenn. 2000). After the district court denied this application, the Tennessee Supreme Court set Coe's execution for April 5, 2000. See *Coe v. State*, 17 S.W.3d 251 (Tenn. 2000). The Court of Appeals for the Sixth Circuit then granted a stay of execution in order to hear fully the merits of Coe's habeas claim. See *Coe v. Bell*, 209 F.3d 815, 818 (6th Cir. 2000). The Sixth Circuit subsequently denied Coe's petition. *Id.* at 248. Coe was executed by lethal injection on April 19, 2000, Tennessee's first execution in forty years. See Jay Hamburg et al., *Coe Executed; Tennessee Carries Out First Death Penalty in 40 Years as Girl's Killer Dies by Injection*, TENNESSEAN, Apr. 19, 2000, at A1.

186. 760 So. 2d 137, 140 (Fla. 2000), *cert. denied*, 481 U.S. 1024 (2000).

187. *Id.*; see *supra* note 91 and accompanying text.

188. *Provenzano*, 760 So. 2d at 139. Actually, the state supreme court had remanded the case, ordering an evidentiary hearing, and then again remanded the case to allow Provenzano another evidentiary hearing with more witnesses. *Id.* These competency hearings were held pursuant to Florida Rule of Criminal Procedure 3.812.

189. *Id.* at 140.

190. *Id.* The supreme court, citing Justice Powell's concurring opinion in *Ford*, held that "the Eighth Amendment only requires that defendants be aware of the punishment they are about to suffer and why they are to suffer it." *Id.*

191. *Id.* at 141 (Anstead, J., dissenting).

192. *Id.*

found to believe that the reason for his execution was not because he murdered another human being, but because he was Jesus Christ.¹⁹³ According to the dissent, Provenzano was unable to connect his execution to the crime of which he was convicted, so he should have been held incompetent to be executed.¹⁹⁴

This case is illustrative of the extent to which an inmate can have mental health problems, and even delusions, but still be found competent to be executed based on current standards.¹⁹⁵ It also displays the degree to which competent and fair judges can disagree on just how competent an inmate must be in order to be executed.¹⁹⁶

C. Billiot v. State

The Supreme Court of Mississippi affirmed the trial court's finding that an inmate was competent to be executed under the state's two-prong test in *Billiot v. State*.¹⁹⁷ James E. Billiot was convicted of capital murder and sentenced to death.¹⁹⁸ The Mississippi Supreme Court held that Billiot was entitled to an evidentiary hearing to determine whether he was competent to be executed.¹⁹⁹ After eight different expert witnesses testified at this hearing, the trial court found Billiot competent to be executed.²⁰⁰

At the competency hearing, Billiot first called Dr. Donald Guild, a psychiatrist who had examined Billiot seven months before the hearing, as an adverse witness.²⁰¹ Dr. Guild did not make a definitive diagnosis, but found Billiot was not psychotic or suffering from paranoid schizophrenia.²⁰² Still, Dr. Guild concluded that Billiot met the criteria for anti-social personality disorder.²⁰³ He found

193. *Id.* (citing the circuit judge's order). Justice Anstead continued that: "In other words we have a judicial finding that Provenzano not only has long suffered from a serious mental illness, but also that Provenzano's illness has caused him to be out of touch with reality in that he has long believed he is Jesus Christ and he is being put to death because of who he is, not because of anything he did." *Id.*

194. *Id.* at 143.

195. See *supra* note 193 and accompanying text.

196. See *supra* notes 189-191 and accompanying text.

197. 655 So. 2d 1, 18 (Miss. 1995), *cert. denied*, 516 U.S. 1095 (1996). It should be noted that Mississippi uses the two-prong test for competency to be executed, in which an inmate must understand the nature of the punishment and be able to assist his or her counsel. See MISS. CODE ANN. § 99-19-57(2)(b) (2000); *supra* note 94 and accompanying text.

198. *Billiot*, 655 So. 2d at 2.

199. *Id.* The competency hearing took place in 1988. *Id.* The trial court determined competency based on MISS. CODE ANN. § 99-19-57(2)(b) and *Ford v. Wainwright*. See *supra* note 94 and accompanying text.

200. *Billiot*, 655 So. 2d at 2, 4-10.

201. *Id.* at 4.

202. *Id.*

203. *Id.*

Billiot was in touch with reality at that time, but stated that competency is time dependent: "It does not mean that he could not have been crazy in the past or in the future . . . [A] man can be competent one time and then three months later, it's very possible that he will become incompetent."²⁰⁴ Dr. Guild testified as to the specific criteria upon which he relied in making his determination, including whether Billiot understood the reason why he was being executed.²⁰⁵ Another psychologist, Dr. Charlton S. Stanley, had examined Billiot along with Dr. Guild and was also called by Billiot as an adverse witness.²⁰⁶ Although he agreed with Dr. Guild that competency is perishable, Dr. Stanley found Billiot competent to be executed.²⁰⁷ Dr. Stanley stated that, in order to be competent to be executed, the prisoner must understand his impending fate and "understand the finality of that; that you can't have some sort of crazy idea that they can't kill you."²⁰⁸

Billiot next called Dr. Robert L. McKinley, a psychiatrist who had examined Billiot several times.²⁰⁹ After his second examination in 1987, Dr. McKinley stated in a report that "[Billiot] definitely has beyond the shadow of a doubt a chronic schizophrenic

204. *Id.*

205. *Id.* Specifically, Dr. Guild asked:

One, does he know what he's facing? Does he know why he's seeing me? Does he know the purpose of the hearing? Can he communicate with his attorney effectively in the hearing, for whatever purpose it is? Does he know he's been convicted? Does he know what he's been convicted of? Does he have an understanding of his legal defense and recourses? Does he understand that he's gonna be executed and the finality of death? Does he understand the reason that he's being executed, the reason that he was sentenced? Does he have a comprehension of that? Does he have a comprehension of the facts or an ability to comprehend any facts that might save him, that might mitigate or change his status?

Id.

206. *Id.* Dr. Stanley had rendered opinions about the competency of three other individuals to be executed in the past, finding them all competent. *Id.* With Billiot, Dr. Stanley's opinion was based on one interview as well as appellant's prior history. *Id.*

207. *Id.*

208. *Id.* In order to be competent to be executed, Dr. Stanley stated that

You've got to be able to understand that you've been charged with a capital crime. That you are liable to execution. That you have to understand that a death sentence means that; that you are to be killed. And you are to understand the finality of that; that you can't have some sort of crazy idea that they can't kill you. You have to understand the purpose for which society deems your death necessary. That's paraphrasing, but I think that hits the—the major points. And if, because of some delusional or insane belief system that you can't meet those criteria, then you would not be competent to be executed. And—oh yeah. You've got to be able—if you think of a mitigating . . . circumstance at the last minute that you can communicate effectively with your attorney or someone. For an example would be to remember a witness at the last moment that . . . says that you didn't do it. I think I hit them all.

Id.

209. *Id.* at 4-5.

disorder.”²¹⁰ At an examination a year later, Dr. McKinley prescribed for Billiot a second anti-psychotic, anti-schizophrenic medication “to calm down his nerves.”²¹¹ At the time of the hearing, Dr. McKinley maintained that Billiot was unquestionably schizophrenic, but would not render an opinion as to his competency to be executed because he would want to evaluate Billiot on the day of the hearing to make such a finding.²¹² He emphasized that individuals with schizophrenia can have their thinking rapidly change, because the disease “is characterized by exacerbation and remissions or relapses and remissions.”²¹³ Dr. McKinley admitted that someone can be a paranoid schizophrenic and still be competent to be executed, but also emphasized that during periodic remissions of the illness, a person can appear totally normal.²¹⁴

Next, Billiot called Dr. Michael Whelan, the director of the Department of Psychiatry at Parchman.²¹⁵ Dr. Whelan performed a battery of tests on Billiot in the hospital in 1984 and had visited Billiot sporadically while he was on death row.²¹⁶ In his report following the tests, Dr. Whelan found Billiot to have symptoms of delusion of reference,²¹⁷ delusions of grandiosity,²¹⁸ nihilism,²¹⁹ and

210. *Id.* at 5. At this time, Dr. McKinley prescribed Mellaril, an anti-psychotic drug, for Billiot. *Id.*

211. *Id.* Dr. McKinley stated that with this second drug, Trilafon, “[t]he symptoms of schizophrenia can be brought under control within four weeks to where they are not present, or at least not as intense or as frequent. However, the individual still has schizophrenia.” *Id.*

212. *Id.* Dr. McKinley testified that he had not seen Billiot since February 1988, and would want to examine him on the day of the hearing “because schizophrenics are very ambivalent—their thinking can rapidly turn.” *Id.* Dr. McKinley added that to determine competency at the time of the hearing “he would want to supplement his clinical interviews with psychological evaluation, including testing—a brain scan, maybe an EEG.” *Id.* An “EEG” is an electroencephalogram, which is “a graphic record of the electrical currents developed by the cerebral cortex.” CHAPLIN, *supra* note 115, at 150.

213. *Billiot*, 655 So. 2d at 5.

214. *Id.* Dr. McKinley also stated that some of the drugs that Billiot admitted to taking (cocaine, speed, downers, LSD, PCP, marijuana) could result in a condition that mimics schizophrenia if taken in high doses over a long period of time. *Id.* at 6. He also stated, however, that drug abuse can be a contributing factor along with schizophrenia to incompetency. *Id.* Dr. McKinley further testified that a man of normal intelligence might still be incompetent to be executed if he is “unable to appreciate the significance between the act for which he was convicted and the execution he will suffer because of the conviction.” *Id.*

215. *Id.* Billiot was examined several times at Parchman, including the examinations by Dr. McKinley. *Id.* at 5-6.

216. *Id.* at 6.

217. “Delusion of reference” is “a false belief that the behavior of others has malign significance for the self” CHAPLIN, *supra* note 115, at 121. The *Billiot* court described it as occurring when a person attaches a particular significance to some event in his or her life that is clearly irrational or out of touch with reality. 655 So. 2d at 6.

218. “Delusions of grandeur” is “the belief, usually psychotic, that one is a great or powerful person.” CHAPLIN, *supra* note 115, at 120.

persecutory content.²²⁰ Dr. Whelan stated that Billiot was "firmly entrenched in a delusional system which [permitted] him to acknowledge the fact that he did indeed murder the Croll family, but which [permitted] an absolution of his guilt."²²¹ Dr. Whelan also testified that the day before the hearing, he heard Billiot mention, while talking to Dr. McKinley, "something about demons and the devil overthrowing the kingdom and that he had been an angel."²²² Dr. Whelan found Billiot competent to be executed in 1985, but would not render an opinion at the hearing without having examined Billiot within a few days of the hearing.²²³ Dr. Whelan admitted on cross-examination that at the time of his last interview with Billiot, he found that Billiot understood his sentence and comprehended the finality of death.²²⁴ Furthermore, he found that Billiot was in touch with reality because he did not think he had any special powers that would prevent the state from executing him.²²⁵ Finally, Dr. Whelan stated that Billiot's condition was subject to change and that if he became "floridly psychotic,"²²⁶ he could be incompetent for execution.²²⁷

Billiot then called Dr. William Johnson, a professor of psychiatry at the University Medical Center, who interviewed Billiot around the same time as Dr. Guild and Dr. Stanley.²²⁸ Dr. Johnson, however, found that Billiot was not competent to be executed because he could not make a connection between his role in the crime and what the state had decided to do to him.²²⁹ He also testified

219. In psychology, nihilism is characterized by a belief that the existing order of things has disappeared. *Id.* at 304.

220. *Billiot*, 655 So. 2d at 6. Dr. Whelan's report was very detailed because he had prepared it as a work sample to be submitted to the American Board of Forensic Psychology. *Id.*

221. *Id.* Dr. Whelan also testified that, although Billiot comprehended his crime, his judgment was impaired because he thought his crime was "not that bad—it was just a family dispute." *Id.* at 7.

222. *Id.* at 6. Dr. Whelan also stated in his report that, after an incident where Billiot was stabbed in prison, the security staff noted that Billiot "was constantly talking to demons and spirits throughout the night." *Id.* at 7.

223. *Id.* Dr. Whelan testified that he did not know if Billiot was still entrenched in a delusional state at the time of the hearing because he had not had an opportunity to examine him. *Id.* at 6. He then stated that "he would prefer to extensively examine Billiot within a few days of the hearing on the question of his competency before he would feel comfortable giving an opinion on the issue." *Id.* at 7.

224. *Id.*

225. *Id.*

226. By "floridly psychotic," Dr. Whelan presumably meant that the symptoms of psychosis had begun to display themselves.

227. *Id.*

228. *Id.* The court recognized Dr. Johnson as an expert witness. *Id.*

229. *Id.* at 8.

that he had seen Billiot for one half-hour the morning before the hearing and found him still incompetent to be executed, as he was unaware of the proceedings against him—Billiot thought he could still plead not guilty to the crime.²³⁰ Dr. Johnson testified that Billiot thought the execution would not succeed “due to his powers and so on.”²³¹ Specifically, Dr. Johnson stated that Billiot knew that he was found guilty of capital murder and was sentenced to die, but that he typically could not relate the sentence to the crime.²³² According to Dr. Johnson, Billiot sometimes denied committing the crime and thought he could still plead not guilty, while at other times he admitted to the murders, but said “there was an omen going around and that he had no choice but to commit the crime.”²³³ Dr. Johnson found Billiot to be schizophrenic and suffering from delusions: “[H]e can take on the identities of other individuals, whether it be Jesus Christ, Pancho Villa or Lucifer, Attila the Hun, Julius Caesar, Napoleon.”²³⁴ Finally, Dr. Johnson testified that someone suffering from paranoid schizophrenia with psychosis is not competent to be executed, while a paranoid schizophrenic without psychosis may or may not be competent to be executed.²³⁵ The distinction apparently was based on the fact that psychosis is considered a more severe mental impairment, especially when coupled with schizophrenia.²³⁶

The State first called Dr. Henry A. Maggio, who had examined Billiot in 1982, finding him competent to stand trial, and in 1988, finding him competent to be executed.²³⁷ Dr. Maggio admitted that he conducted no formal psychological testing in determining that Billiot was not paranoid schizophrenic.²³⁸ He also agreed that schizophrenia fluctuates; thus, competency to be executed may

230. *Id.* Dr. Johnson stated: “Billiot does not have a rational understanding of the proceedings . . . he does not understand the—he knows what he was tried for in a factual sense, but rationally he can’t connect what he was tried for and . . . the penalty and his actions. He can’t relate those. And he also feels that—and believes that he will never be executed.” *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.* After stating that he did not think Billiot was malingering, Dr. Johnson noted that an overwhelming majority of his testimony in the past had supported the state, having testified for the defendant at a competency hearing only one other time. *Id.* Dr. Johnson admitted on cross-examination that he is philosophically opposed to the death penalty, but maintained that it does not interfere with his clinical analysis. *Id.* at 9.

235. *Id.* For medical definitions of “schizophrenia” and “psychosis,” see *supra* notes 120, 134.

236. See *supra* note 134.

237. *Billiot*, 655 So. 2d at 8.

238. *Id.*

come and go.²³⁹ The State then called Dr. Guild back to the stand, who stated that, in his opinion, Billiot was clearly competent to be executed when Dr. Guild interviewed him in 1988.²⁴⁰ As proof that Billiot was in touch with reality, Dr. Guild emphasized that, when asked to choose between forms of execution, Billiot could not choose and "was able to joke about it a little."²⁴¹ Dr. Guild also found it very significant that Dr. Whelan had never actually seen Billiot in a "floridly psychotic" state.²⁴² Finally, the State called Dr. Stanley back to the stand to testify that Billiot's scores on the Minnesota Multiphasic Personality Inventory Profile Test indicated characteristics of anti-social personality disorder, not paranoid schizophrenia.²⁴³ He also testified that Billiot in his interview admitted to not having any special powers.²⁴⁴ Dr. Stanley found Billiot competent to be executed, but admitted on cross-examination that competency is perishable and fluid.²⁴⁵

The Mississippi Supreme Court found Billiot competent to be executed, noting that the only expert finding him presently incompetent was Dr. Johnson.²⁴⁶ The court found persuasive the fact that several experts conducting examinations at differing times over several years each had reached the same conclusion.²⁴⁷ The court did note, however, that Dr. Johnson had completed more recent and more extensive research on the issue of Billiot's insanity, and had found him incompetent.²⁴⁸

239. *Id.*

240. *Id.*

241. *Id.* Dr. Guild also thought that Billiot was malingering. *Id.* Furthermore, he distinguished ability to assist counsel from willingness to assist counsel, so that Billiot's uncooperative behavior with his attorney at times was not significant. *Id.* at 9.

242. *Id.*

243. *Id.*

244. *Id.* Dr. Stanley thought Billiot was malingering, but also admitted that appellant did not claim to feel insane in his interview. *Id.*

245. *Id.* Dr. Stanley noted that an eleventh hour examination had been done on another death row inmate to ensure competency. *Id.*

246. *Id.*

247. *Id.*

248. *Id.* According to the court, his factor was not sufficient to meet the requirement that the trial court's post-conviction ruling only be reversed if appellant can prove that it is against the overwhelming weight of evidence or an abuse of discretion. *Id.* at 12.

V. DISCUSSION OF THE PROBLEMS WITH THE CURRENT STANDARDS

A. Multiple Examinations and "Imminence"

In her dissent in *Ford v. Wainwright*,²⁴⁹ Justice O'Connor pointed out one major problem with applying the rule against executing an incompetent person: "Regardless of the number of prior adjudications of the issue, until the very moment of execution the prisoner can claim that he has become insane sometime after the previous determination to the contrary."²⁵⁰ Justice O'Connor feared the potential for false claims and deliberate delays because the prisoner could suspend execution during an incompetency hearing, despite the fact that he or she was already validly convicted and sentenced under the law.²⁵¹

249. 477 U.S. 399 (1986).

250. *Id.* at 429 (O'Connor, J., dissenting) (citing Hazard & Louisell, *supra* note 36, at 399-400). Justice Rehnquist echoed similar concerns in his dissent. *Supra* note 74; see also *Martin v. Dugger*, 686 F. Supp. 1523, 1560 (S.D. Fla. 1988) (remanding the case for an evidentiary hearing to resolve the issue of competency); *State v. Scott*, 746 N.E.2d 1124, 1126 (Ohio 2001) (Pfeifer, J., concurring) ("*Wainwright* clearly states that the insane may not be executed, but it is unclear when the determination of sanity must be made.").

251. *Ford*, 477 U.S. at 429. Justice O'Connor recognized the "very great" interest of the prisoner in avoiding an erroneous determination, but thought the procedures established by the majority were excessive. *Id.* A related question outside the scope of this Note is the issue of drug-induced competency to be executed, with its myriad of medical ethics problems. See *Singleton v. Norris*, No. 00-1492, 2001 U.S. App. LEXIS 21770, at *30 (8th Cir., Oct. 12, 2001) ("Thus, even if we assume Singleton is *Ford* competent while on his medication—an assumption we hesitate to make—it appears that there is no way of knowing how long he will remain competent once the medication is discontinued or how long it will take to regain *Ford* competency once he begins taking medication. In short, there is no way for us to know whether Singleton will be competent on the day he is executed."); Jenkins, *supra* note 8, at 178 ("The issue of drug-induced competency for the purpose of execution is fraught with absurdity Although the prohibition against executing the insane has survived through the ages as a symbol of civilized society, perhaps it would be preferable to cast aside the prohibition altogether, rather than condone the hypocritical strategies employed to chemically mask the insane prisoner. We could avoid the macabre, brutish ritual of psychologically and medically grooming one for execution under the pretense of observing the humane standards preserved through our history and memorialized in our constitution."). See generally Byers, *supra* note 8; Kristin Wenstrup Crosby, Comment, *State v. Perry: Louisiana's Cure-to-Kill Scheme Forces Death-Row Inmates to Choose Between a Life Sentence of Untreated Insanity and Execution*, 77 MINN. L. REV. 1193 (1993); Rebecca A. Miller-Rice, Comment, *The "Insane" Contradiction of Singleton v. Norris: Forced Medication in a Death Row Inmate's Medical Interest Which Happens to Facilitate His Execution*, 22 U. ARK. LITTLE ROCK L. REV. 659 (2000); Salguero, *supra* note 7; Ptolemy H. Taylor, Comment, *Execution of the "Artificially Competent": Cruel and Unusual?*, 66 TUL. L. REV. 1045 (1992). There are also medical ethics issues involved in treating an incompetent death row inmate at all, if successful treatment will only lead to his or her execution. See Bruce A. Arrigo & Christopher R. Williams, *The Case of Treatment Refusal for Incompetent Prisoners Awaiting Execution*, 25 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 367, 368 (1999) (discussing whether the execution of a mentally ill

This problem is well illustrated in *Coe v. Bell*.²⁵² In his testimony, Dr. Kenner stated that he twice found Coe competent to be executed, and twice found him incompetent to be executed.²⁵³ Dr. Kenner attributed this discrepancy to his diagnosis that Coe had DID, which causes a person to enter into another identity when faced with significant distress.²⁵⁴ Dr. Kenner opined that as execution drew near, Coe would become incompetent because he would dissociate, but both the state courts and the federal district court were skeptical of this diagnosis because there was proof that Coe looked forward to dying and saw it as a release.²⁵⁵ The Sixth Circuit specifically addressed this problem in its review of Coe's case.²⁵⁶ After noting Justice O'Connor's concerns, the court held that the Supreme Court in *Ford* did not mean to require the state to determine a prisoner's competency at the exact time of execution.²⁵⁷ Rather, the state must make its determination when execution is "imminent."²⁵⁸ In this case, Coe's competency determination was

offender is in the best interest of the state and society or "the quintessential expression of judicially sponsored inhumanity"). See generally Michael L. Radelet & Gorge W. Barnard, *Ethics and the Psychiatric Determination of Competency to Be Executed*, 14 BULL. AM. ACAD. PSYCHIATRY L. 37 (1986); Robert T.M. Phillips, *Professionalism, Mental Disability, and the Death Penalty: The Psychiatrist as Evaluator: Conflicts and Conscience*, 41 N.Y.L. SCH. L. REV. 189 (1996). The Supreme Court has held that prisoners can be treated with antipsychotic drugs against their will, without violating the Due Process Clause, if they are dangerous to themselves or others. *Washington v. Harper*, 494 U.S. 210, 219-27 (1990).

252. Both the federal district and appellate court reviews of *Coe v. State*, 17 S.W.3d 193 (Tenn. 2000), address this problem. *Coe v. Bell*, 209 F.3d 815 (6th Cir.), cert. denied, 529 U.S. 1084 (2000); *Coe v. Bell*, 89 F. Supp. 2d 922 (M.D. Tenn. 2000).

253. *Coe*, 89 F. Supp. 2d at 929 (quoting Justice O'Connor's concerns in *Ford*). Most importantly, Dr. Kenner found Coe competent to be executed "on a good day" during his last visit on January 12, 2000. *Id.* at 931.

254. *Id.* at 930. The court noted that the initial cause of this disorder was that Coe was apparently subjected to sexual abuse by his father, at which times he would dissociate. *Id.* Dr. Kenner stated that Coe typically dissociated around specific issues of "somebody threatening him, threatening his physical integrity, threatening to abuse him in some way." *Id.*

255. *Id.* The court cited several pages of the transcript from the hearing that indicated that Coe at times indicated that he wanted his lawyers to stop waging the competency fight and allow him to be executed. *Id.* Coe had told one doctor, "I know you are here to find out if I'm crazy so they can execute me. I am not crazy." *Coe*, 17 S.W.3d at 247.

256. *Coe*, 209 F.3d at 824-25.

257. *Id.* at 824.

258. *Id.* (citing *Stewart v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998)). The court found that the Tennessee Supreme Court's use of the term "present competency" was a proper understanding of competency to be executed "at his imminently scheduled execution date." *Id.* at 825. The court found the imminency satisfied because the competency hearing took place in late January 2000, and the trial court issued its decision on February 2, 2000. *Id.* In *Stewart*, the Supreme Court held that an inmate's request for federal habeas corpus relief, which was previously dismissed as premature, was not subject to the restriction on "second or successive" applications under 28 U.S.C.S. § 2224(b). 523 U.S. 637, 645 (1998). The Court emphasized that the previous *Ford* claim was dismissed as premature, not because he had not exhausted state remo-

made while his execution was less than two months away—adequately imminent to satisfy due process.²⁵⁹

This problem is also well illustrated in *Billiot*, where all doctors agreed that they would need to examine Billiot right before the hearing to make a determination of his present competency.²⁶⁰ Most notably, Dr. McKinley testified that individuals suffering from schizophrenia are subject to multiple remissions and relapses, sometimes appearing completely normal and other times having a break with reality.²⁶¹ As one doctor in another case succinctly stated: with a paranoid schizophrenic prisoner, “there is no way of predicting [his or her] mental state on the day of execution.”²⁶² One court even went so far as to order that the prison officials keep the condemned prisoner under watch, retaining jurisdiction to stay execution if any officials determined that the prisoner was not competent to be executed when the moment of execution actually arrived.²⁶³

If courts are to take the stance that the prisoner’s execution must be “imminent” in order to determine competency, the question remains how to apply that standard: What does “imminent” mean? Should the definition depend on the type of mental illness from which the prisoner suffers? Must the experts who testify at the competency hearing have examined the prisoner in the days immediately preceding the hearing?²⁶⁴ Should courts take into consideration evidence that a prisoner will likely become more incompetent as the date of execution nears, or only determine his or her “present” competency to be executed?²⁶⁵

dies, but “because his execution was not imminent and therefore his competency to be executed could not be determined at that time.” *Id.* at 644-45.

259. *Coe*, 209 F.3d at 825. The court held that “[w]hether the competency determination is made in the week or the month before the prisoner’s scheduled execution, the state is entitled to exercise discretion in creating its own procedure ‘as long as basic fairness is observed.’” *Id.* at 824-25 (quoting *Ford v. Wainwright*, 477 U.S. 399, 427 (1986) (Powell, J., concurring)). The court also noted that in *Van Tran*, Tennessee had allowed for a procedure to raise subsequent *Ford* claims if there was a showing of a “substantial change in the prisoner’s mental health since the previous determination of competency was made.” *Id.* at 825 (quoting *Van Tran v. State*, 6 S.W.3d 257, 272 (Tenn. 1999)).

260. See *supra* Part IV.C. and notes 212, 223, 245.

261. See *supra* notes 213-14 and accompanying text.

262. *Commonwealth v. Jermyn*, 709 A.2d 849, 853 (Pa. 1998) (affirming the trial court’s determination of competency to be executed, despite the inmate’s paranoid schizophrenia and conflicting expert testimony as to the inmate’s understanding of the reasons for his execution).

263. *Weeks v. Jones*, 52 F.3d 1559, 1573 (11th Cir.), *cert. denied*, 514 U.S. 1104 (1995).

264. Several of the doctors in *Billiot* refused to give an opinion as to present competency to be executed because they had not examined the prisoner immediately prior to the hearing. See *supra* Part IV.C.

265. See, e.g., *supra* note 227 and accompanying text.

If the execution is not found to be "imminent," then the *Ford* claim will presumably be dismissed as not ripe.²⁶⁶ If, however, the execution is found imminent, should courts deny all subsequent reviews of the prisoner's mental health, even under extreme circumstances? If not, do the administrative costs and monopolization of judicial time warrant such multiple competency determinations? If a competency hearing is allowed in the days preceding the execution, how can the fundamental principle of thorough judicial review be maintained? As one court pointed out, this produces a conundrum: if a stay is granted to determine competency once execution is imminent, then the execution date must be postponed until such determination is made. Ironically, the court continued, the stay itself would moot the reason for the stay because the execution would no longer be imminent.²⁶⁷ As these concerns illustrate, significant problems exist in the current framework for determining the imminence of an execution.

B. Terminology

There is much discussion in various opinions about what level of competency *Ford* requires: "awareness," "understanding," "knowledge," "comprehension," or "realization."²⁶⁸ By way of example, in his concurring opinion in *Ford*, Justice Powell, at different

266. See, e.g., *Hance v. Kemp*, 373 S.E.2d 184, 192 (Ga. 1988) (dismissing the appellant's *Ford* claim because his execution was not imminent); *Colburn v. State*, 966 S.W.2d 511, 513 (Tex. Crim. App. 1998) (dismissing petitioner's *Ford* claim because his execution was not imminent); see also *Steward v. Martinez-Villareal*, 523 U.S. 637, 644-45 (1998) (holding that a *Ford* claim raised for the second time after his first claim was dismissed because execution was not imminent was not a "second or successive" application under the Antiterrorism and Effective Death Penalty Act); Charles M. Mallin, *Death Penalty: Texas Law—Subsequent Writs and Abuse of the Writ Doctrine in Texas*, 6 TEX. WESLEYAN L. REV. 151, 174-75 (2000).

267. *Poland v. Stewart*, 41 F. Supp. 2d 1037, 1040 (D. Ariz. 1999), cert. denied, 528 U.S. 845 (1999). The court explained that "[t]he circular logic goes like this: (1) there must be a pending execution date before a *Ford* claim is ripe; (2) staying the execution to consider a *Ford* claim effectively vacates the execution date; thus, (3) the *Ford* claim would not be ripe." *Id.* The court compares this problem to M.C. Escher's never-ending stairway in "Ascending and Descending" and Zeno's paradox of an arrow never reaching its target because it must cover half the distance, then half the remainder, and so on, ad infinitum. *Id.* at 1040-41. The court's discussion was in dicta because the holding was that the petitioner had not exhausted his state court remedies. *Id.* at 1043.

268. See, e.g., *supra* notes 127, 191, 208 and accompanying text. A dictionary of psychology offers definitions of these terms that similarly overlap: "awareness: 1. consciousness; alertness. 2. cognizance of something; a state of knowledge or understanding of environmental or internal events," CHAPLIN, *supra* note 115, at 46; "understanding: 1. the process of apprehending meaning" *id.* at 481; "comprehension: understanding, grasping; the process of reacting intelligently in a problem situation," *id.* at 94.

points, used the terms "awareness," "understands," and "perceives the connection."²⁶⁹ State statutes have shown similar differences in terminology.²⁷⁰ This imprecision leaves courts and expert witnesses to try to distinguish between these different levels of competency.

Again, the *Coe* decisions²⁷¹ offer an excellent illustration of the problem. One of *Coe*'s claims on appeal to the Tennessee Supreme Court was that the trial court mistakenly required only that he be "aware" of the fact of his impending execution and the reason for it, rather than actually have an "understanding" of those facts.²⁷² Indeed, Dr. Merikangas made just such a distinction: "I agree that [*Coe*] is aware of an execution. My point is that he does not have the mental capacity to understand."²⁷³ Dr. Merikangas based this assertion on his opinion that *Coe* had a delusional belief that when executed he would "simply be in another place in the same body, [would] visit his ex-wife and child . . . [would] maybe temporarily be one of these balls of fire that speaks to people."²⁷⁴ The Tennessee Supreme Court, however, cited *Van Tran v. State*²⁷⁵ in holding that a prisoner is only incompetent to be executed if he or she is "unaware" of the punishment and the reason they are to suffer it.²⁷⁶ The *Coe* court stated that "awareness" and "understanding" should not be ascribed the technical meanings they may have in the field of psychology in determining competency to be executed.²⁷⁷ The court based this holding on the fact that, in *Ford*, Justice Powell used various terms²⁷⁸ when describing the Eighth Amendment competency standard "as synonyms" for the same level of competency.²⁷⁹ Thus, *Coe*'s attempt to distinguish understanding

269. 477 U.S. 399, 421-22 (1986) (Powell, J., concurring).

270. See *supra* Part III.

271. See *supra* note 107.

272. *Coe v. State*, 17 S.W.3d 193, 219 (Tenn. 2000). *Coe* argued, based on his expert witnesses, that he had only an awareness, not an understanding. *Id.* at 219-20.

273. *Id.*

274. *Id.* at 220. Dr. Merikangas noted that these beliefs did not appear to be religious in nature. *Id.*

275. 6 S.W.3d 257, 266 (Tenn. 1999), *cert denied*, 529 U.S. 1091 (2000).

276. *Coe*, 17 S.W.3d at 220.

277. *Id.* In support of this idea, the court quoted from its own decision in *Van Tran*. 6 S.W.3d at 266. In setting the standard for determining competency to be executed, the *Van Tran* court used the words "unaware," "not competent," and "lacks the mental capacity to understand" interchangeably. *Id.*

278. The *Coe* court noted that Justice Powell used "know," "perceives," "aware," and "unaware" in describing his competency standard. *Coe*, 17 S.W.3d at 220; see *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring). The district court similarly dismissed *Coe*'s attempt to distinguish awareness from comprehension by referring to the variety of terms that Justice Powell used. *Coe v. Bell*, 89 F. Supp. 2d 922, 937 n.22 (M.D. Tenn. 2000).

279. *Coe*, 17 S.W.3d at 220.

from awareness was rejected.²⁸⁰ This reliance on the common definition of the words, rather than their technical meaning in the field of psychology, is curious considering the basis for the court's finding that Coe was competent was almost entirely the testimony of psychologists and other mental health experts.²⁸¹ There does not appear to be a sound basis for a court to decide that a mental health expert's distinction between understanding and comprehension is not relevant to a competency determination.

The Sixth Circuit also addressed Coe's claim that the trial court impermissibly relied on his "knowledge" that he was to be executed, rather than his "comprehension of the sentence and its implications."²⁸² In his petition, Coe relied on Justice Marshall's statement in the plurality for *Ford* that a prisoner should be able to "comprehend the nature of the penalty."²⁸³ The court pointed out that Justice Marshall never actually set forth what he thought the standard should be, so it could not "conclude he meant to do so with this one statement."²⁸⁴

This terminology problem is also illustrated in the Florida Supreme Court's decision in *Provenzano v. State*.²⁸⁵ The court found that the case was "troubling" because Provenzano clearly had some mental health problems.²⁸⁶ Nevertheless, the court found that the Eighth Amendment only requires that a defendant "be aware" of the punishment she is about to suffer and why she has been sentenced.²⁸⁷ The court then agreed with the trial court that Provenzano "[did] not lack the mental capacity to understand" these

280. *Id.*

281. *Id.* at 221. The court also used Coe's own actions during the hearing as evidence of his competency. *See supra* notes 178-83 and accompanying text.

282. *Coe v. Bell*, 209 F.3d 815, 826-27 (6th Cir.), *cert. denied*, 529 U.S. 1084 (2000).

283. *Id.* at 827 n.4; *see Ford*, 477 U.S. at 417 (Marshall, J., plurality opinion).

284. *Coe*, 209 F.3d at 827 n.4. The reasoning was that Justice Marshall's plurality in *Ford* only addressed the issue on point—whether the procedures Florida used comported with due process. *See supra* note 55 and accompanying text. Thus, the court found that the Tennessee Supreme Court properly interpreted Justice Powell's opinion in *Ford*, and its adoption in *Van Tran*. *Coe*, 209 F.3d at 827. The court also believed that Coe both understood and comprehended the death penalty anyway. *Id.* at 827 n.4. In *Billiot v. State*, the prisoner also argued that the trial judge had placed too much emphasis on his intelligence and not enough on his rational understanding of his fate. 655 So. 2d 1, 15 (Miss. 1995), *cert. denied*, 576 U.S. 1095 (1996). The court, however, found that intelligence was a proper factor on which to rely in determining competency to be executed. *Id.*

285. 760 So. 2d 137 (Fla.), *cert. denied*, 481 U.S. 1024 (2000); *see supra* Part IV.B.

286. *Provenzano*, 760 So. 2d at 140.

287. *Id.*

facts.²⁸⁸ The court apparently found no problem in using the terms "awareness" and "understanding" interchangeably.

The dissent in *Provenzano*, on the other hand, focused on Provenzano's delusions in determining the level of his acceptance of his impending execution.²⁸⁹ This dissenting justice noted that the trial judge struggled with what the competency standard should be, ultimately finding that Provenzano did not need to have a "rational acceptance" of the reasons for his execution because a maintenance of innocence is "a fairly normal human reaction."²⁹⁰ This decision was inappropriate, according to the dissenting justice, because Provenzano's rejection of the reasons for his execution was based on a delusional belief that he was being executed because he was Jesus Christ.²⁹¹ As he noted, Justice Powell in *Ford* stated that a prisoner must be able to connect the execution to the crime for which he or she was convicted.²⁹² If a prisoner like Provenzano does not realize why he is being executed, then the retributive purpose behind the death penalty is not served.²⁹³

The dissent in *Provenzano* quoted extensively from the reasoning in another Florida case, *Martin v. Dugger*.²⁹⁴ The *Martin* court stated that if a prisoner does not appreciate the connection between his crime and punishment, imposing the death penalty would violate the Eighth Amendment.²⁹⁵ The court further held that such an execution would be inconsistent with both the deterrence and "channeling of anarchy" rationales behind the death penalty.²⁹⁶

288. *Id.*

289. *Id.* at 141 (Anstead, J., dissenting).

290. *Id.*

291. *Id.*; see *supra* notes 191-94 and accompanying text.

292. *Provenzano*, 760 So. 2d at 141 (citing *Ford v. Wainwright*, 477 U.S. 399, 423 (1986) (Powell, J., concurring)).

293. *Id.* at 143; see *supra* notes 44-46 and accompanying text.

294. 686 F. Supp. 1523 (S.D. Fla. 1988). This case also involved a *Ford* claim of present competency to be executed in which the federal district court ordered an evidentiary hearing to resolve the issue of competency. *Id.* at 1573. The basis of the remand was the fact that the trial judge had failed to determine whether Martin's understanding of the nature of the death penalty and why it was imposed on him "was grounded in reality." *Id.* at 1573 n.23.

295. *Id.* at 1569. In a discussion of the "just-deserts theory," the court added that "[i]n many respects, the execution of a prisoner who does not have this appreciation is a *lesser* punishment than society intended to give." *Id.* (emphasis added). See *Billiot v. State*, 655 So. 2d 1, 8 (Miss. 1995), *cert. denied*, 516 U.S. 1095 (1996) (noting that one mental health expert found the prisoner not competent to be executed because he could not rationally connect what he was tried for and the penalty of execution).

296. *Martin*, 686 F. Supp. at 1569-70. The channeling of anarchy theory, according to the court, advocates that the state administer punishment in an ordered, rational fashion. *Id.* Thus, the execution of someone who did not appreciate the connection between his crime and punishment "is nothing more than an unrestrained act of violence" because it would "defeat the admin-

Thus, the court held, the prisoner must appreciate the connection between his crime and punishment both subjectively²⁹⁷ and objectively.²⁹⁸ In other words, the court must determine whether the defendant's logical connection between the crime and execution is consistent with that of ordinary human experience.²⁹⁹

The Fifth Circuit seemed to reject such a requirement of a rational understanding of execution and the reasons for it in *Barnard v. Collins*.³⁰⁰ The court noted that the prisoner established through experts that his perception of the reason for his conviction and pending execution was "at times distorted by a delusional system in which he attributes anything negative that happens to him to a conspiracy of Asians, Jews, Blacks, homosexuals, and the Mafia."³⁰¹ Nevertheless, the court found that the experts did not establish that the prisoner lacked knowledge of his impending execution and the reason for it, as required under *Ford*.³⁰² Similarly, in *Garrett v. Collins*,³⁰³ the prisoner argued that he was not fully aware of the consequences of the death penalty because he believed his dead aunt would protect him from the effects of the sedative and toxic agents used.³⁰⁴ The court held that "this belief of hope" does not prevent execution under *Ford* because Garrett knew that "when that needle goes into his arm that it's possible for him to suffer death."³⁰⁵

Whether a defendant who does not think that she will actually die is "aware" of her impending fate is a related issue, as illustrated in *Garrett*³⁰⁶ and *Billiot*.³⁰⁷ In *Singleton v. State*, the Supreme

istrative organization of justice." *Id.* Similarly, the court reasoned, such an execution would serve no deterrence but "would be tantamount to an act of inhumanity." *Id.* at 1570.

297. "The subjective part is nothing more than the defendant's perception of the connection between his crime and punishment." *Id.*

298. "The objective aspect of this realization test . . . determines whether the defendant's subjective understanding is grounded in reality; that is, is rational." *Id.*

299. *Id.* at 1570 n.20. The court found this requirement consistent with Justice Powell's language in *Ford*. *Id.* at 1571. *But see* Arrigo & Williams, *supra* note 251, at 406 ("Thus, to be competent under the law, is to be qualified or to be fit. It is the capacity to make one's own decisions, regardless of how ridiculous the choices appear.").

300. 13 F.3d 871 (5th Cir. 1994). *Barnard* involved a *Ford* claim out of Texas in which the court denied the petitioner's application for a stay of execution. *Id.* at 877.

301. *Id.* at 876.

302. *Id.* at 877.

303. 951 F.2d 57 (5th Cir. 1992).

304. *Id.* at 58.

305. *Id.* at 59 (internal quotation marks omitted). The court held that this hope of escaping death did not prevent Garrett's ability to prepare for his passing. *Id.* (citing *Ford v. Wainwright*, 477 U.S. 399, 417 (1986)).

306. *Id.*

307. *See supra* note 231 and accompanying text.

Court of South Carolina found such a belief sufficient to support a finding of incompetency to be executed.³⁰⁸ The court held that, because of his reliance on "protective genes," Singleton was completely unaware that he was capable of dying in the electric chair.³⁰⁹

As these cases make clear, current standards for determining competency to be executed simply do not adequately distinguish between a prisoner's awareness, knowledge, and comprehension of their impending fate. Often, expert witnesses *do* distinguish between these levels of awareness.³¹⁰ Is mere awareness all that is required by the Eighth Amendment? If so, how can a court decide that a prisoner who thinks she is being punished for some other reason,³¹¹ or will not actually die,³¹² is really aware of her execution and the reason for it, although clearly not comprehending it?

C. Other Problems

1. Conjunctive or Disjunctive?

The district court in *Coe v. Bell* noted an additional problem resulting from vague standards for determining competency.³¹³ *Coe* raised a claim that Tennessee's standard for competency set forth in *Van Tran*³¹⁴ violated the Eighth and Fourteenth Amendments because it was a "conjunctive standard that requires a petitioner to prove both an 'unawareness' of the execution, as well as an 'unawareness' of the reason for the execution."³¹⁵ Since the defendant bears the burden of showing his or her incompetency to be executed, this fact would mean that someone aware of the punishment, but unaware of the reasons for it, would still be competent for execution.³¹⁶ The court stated that this assertion "may technically be

308. 437 S.E.2d 53, 58 (S.C. 1993). The court adopted the *ABA Standards* and its two-prong test as the standard for determining competency, finding that Singleton failed to pass either the "cognitive" or the "assistance" prongs. *Id.*

309. *Id.*

310. See generally *supra* Part IV.

311. See, e.g., *Provenzano v. State*, 760 So. 2d 137, 141 (Fla. 2000) (Anstead, J., dissenting) (discussing Provenzano's belief that he was being executed because he was Jesus Christ).

312. See *supra* note 304 and accompanying text.

313. 89 F. Supp. 2d 922, 939 (M.D. Tenn. 2000).

314. *Van Tran v. State*, 6 S.W.3d 257 (Tenn. 1999), *cert. denied*, 529 U.S. 1091 (2000); see *supra* notes 98-100 and accompanying text.

315. *Coe*, 89 F. Supp. 2d at 939. *Coe*'s claim was presumably based on the Eighth Amendment's ban on cruel and unusual punishment and the Fourteenth Amendment's Due Process Clause. U.S. CONST. amends. VIII, XIV.

316. *Coe*, 89 F. Supp. 2d at 939.

true," but that as applied in that case it was not an issue because Coe was found to be aware of both the impending execution and the reasons for it.³¹⁷ There is reason to believe this problem could be at issue in future decisions, however, because such vagueness permeates several states' standards.³¹⁸ For example, both Florida and Texas use conjunctive standards,³¹⁹ while Arizona and Missouri use disjunctive standards.³²⁰

The difference between a conjunctive and disjunctive standard cannot be overstated. If a prisoner must prove *both* that she does not understand that she will soon be executed, and that she does not understand why she was sentenced to death, then that burden will rarely be met. All a state would have to do is prove one or the other and the execution would proceed, no matter how deficient the prisoner's understanding with regard to the other part of the test. If, however, the standard is disjunctive, then it is the prisoner who must only prove a lack of understanding of *either* the impending execution or the reasons for it. Based on the rationales behind the rule against executing the insane³²¹ and the fact that the prisoner bears the burden of proof,³²² a disjunctive standard is more logical. Most likely, Justice Powell in *Ford* meant that a person is only competent if the state proves *both* awareness of execution and awareness of the reason for it.³²³ It is awkward to phrase the test from the standpoint of the state, however, and then place the burden on the prisoner. A clearer and more just test would provide that

317. *Id.*

318. Justice Powell also announced a conjunctive test. See *Ford v. Wainwright*, 477 U.S. 399, 422 (1986) (Powell, J., concurring).

319. FLA. R. CRIM. P. R. 3.811(b) (2000) ("A person under sentence of death is insane for purposes of execution if the person lacks the mental capacity to understand the fact of the impending execution and the reason for it."); TEX. CRIM. PROC. CODE ANN. § 46.04(h) (Vernon 2000) ("A defendant is incompetent to be executed if the defendant does not understand: (1) that he or she is to be executed and that the execution is imminent; and (2) the reason he or she is being executed.").

320. ARIZ. REV. STAT. ANN. § 13-4021(B) (West 2000) ("As used in this article, 'mentally incompetent to be executed' means that due to a mental disease or defect a person who is sentenced to death is presently unaware that he is to be punished for the crime of murder or that he is unaware that the impending punishment for that crime is death."); MO. ANN. STAT. § 552.060(1) (West 2000) ("No person condemned to death shall be executed if as a result of mental disease or defect he lacks the capacity to understand the nature and purpose of the punishment about to be imposed upon him or matters in extenuation, arguments for clemency or reasons why the sentence should not be carried out.").

321. See *supra* Part II.B.

322. See *supra* note 66 and accompanying text.

323. See *supra* note 68 and accompanying text.

a prisoner should not be executed if she can prove that she is unaware *either* of her impending fate or the reasons for it.³²⁴

2. "Insane" or "Incompetent"?

At least one commentator has noted that, although the terms "incompetent" and "insane" have been used interchangeably to describe those protected under *Ford*, "not only are these terms archaic,³²⁵ but they are also an imprecise means of initially identifying the members of the group that *Ford* envisions protecting."³²⁶ In fact, "insanity" is not generally recognized as a psychological diagnosis at all.³²⁷ After noting the wide range of choices for terms,³²⁸ the author notes that "[u]ltimately, the decision as to which term or phrase to adopt will be contingent upon the manner in which *Ford* should be interpreted."³²⁹ Upon this author's reading of *Ford*, the most appropriate term might be "severe mental impairment."³³⁰ Given a court's reliance on mental health experts to determine competency to be executed, the choice of terminology can prove extremely important.³³¹

324. For a suggested statutory test, see *infra* Part VI.B.

325. See *supra* note 28.

326. Harding, *supra* note 43, at 130. A dictionary of psychology defines "incompetence" as "lacking the necessary ability or qualification properly to carry out a task," and stated that "[i]n psychiatric literature, *incompetence* refers to a state characteristic of insane or mentally deficient persons who, because of their deficiency, are not legally responsible." CHAPLIN, *supra* note 115, at 224. It also defines "insanity" as "a serious mental disorder that renders the individual incapable of conducting his affairs in a competent manner," and states that "[i]nsanity is a legal, not a psychological term." *Id.* at 231.

327. *Id.*

328. "The potential choices range from broad terms, such as 'mental disorder,' 'mental impairment,' or 'mental affliction,' to narrower and more specific terms, such as 'mental illness,' 'mental retardation,' or 'psychiatric disorder.'" Harding, *supra* note 43, at 130.

329. *Id.* The reason is that the rule against executing incompetent prisoners is based on the Eighth Amendment.

330. *Id.* at 133. The problem of defining "mental illness" dates at least as far back as 1955, when the Pennsylvania Supreme Court found the term to include "mental abnormalities which would not come within strict connotation of the term legal insanity." *Commonwealth v. Moon*, 117 A.2d 96, 101 (Pa. 1955). More recently, however, the Texas Court of Criminal Appeals found that *Ford* proscribes "the execution of an *insane* person, not the *imposition of sentence* on a *mentally ill* person." *Colburn v. State*, 966 S.W.2d 511, 513 (Tex. Crim. App. 1998); see *State v. Nix*, 40 S.W.3d 459, 463 (Tenn. 2001) (holding that "mental illness is not the equivalent of mental incompetence" (citing *Coe v. State*, 17 S.W.3d 193, 221 (Tenn. 2000))).

331. See *infra* Part VI.B.

3. Subjective Judicial Judgment

Most often, several experts offer competing testimony on the issue of the prisoner's competency to be executed.³³² In fact, these experts sometimes admit that the diagnoses of other mental health experts, although different from their own, are reasonable.³³³ As Justice Powell noted in *Ford*, "[T]he competency determination depends on expert analysis in a discipline fraught with 'subtleties and nuances.'" ³³⁴ Nevertheless, the question of the prisoner's sanity "calls for a basically subjective judgment."³³⁵ Since the ultimate decision rests with the judge,³³⁶ she should be given a more detailed definition of "competency to be executed" than is presently given under *Ford* or the applicable state statute.³³⁷

In *Weeks v. Jones*,³³⁸ the Eleventh Circuit commended the trial judge, who "ultimately had to determine Weeks's competency to be executed," for directly intervening to ask the prisoner questions to assist in his competency determination.³³⁹ The questioning, according to the trial judge, was "for the purpose of gaining insight into his mental processes, of trying to determine how his mind was operating, and of 'probing into his mind and how he views the world and what he knows and [] how he perceives things.'" ³⁴⁰ It is arguable that such judicial intervention is an appropriate means of aid-

332. See *supra* Part IV. For example, in *Coe v. State*, one doctor diagnosed Coe as suffering from DID, while another testified that he was skeptical about whether the condition of DID existed at all. 17 S.W.3d 193, 234, 243 (Tenn. 2000). The trial court itself stated that it had some question about the diagnosis of DID, although recognizing that it was not an expert in the field of mental health disorders. *Id.* at 235.

333. See *supra* note 174 and accompanying text.

334. 477 U.S. 399, 427 (1986) (quoting *Addington v. Texas*, 441 U.S. 418, 430 (1979)).

335. *Id.*

336. In most cases, the judge has made the final determination of insanity as required by statute. See *supra* Part III.A. For an example of a jury making the determination of present sanity to be executed, see *Garrison v. State*, 378 P.2d 401, 402 (Colo. 1963).

337. This problem is all the more acute because the standard for determining competency to be executed is distinct from the standards for competency to stand trial or waive right to counsel. See, e.g., *Coe v. Bell*, 209 F.3d 815, 826-27 (6th Cir.) ("Because competency to be executed involves different interests than competency to stand trial in the first instance, we do not believe that a state rigidly must apply the competency-to-stand-trial standard in this context where it does not make sense in modern practice."), *cert. denied*, 529 U.S. 1084 (2000). For a current discussion of involuntarily medicating defendants during trial, see generally Dora W. Klein, Note, *Trial Rights and Psychotropic Drugs: The Case Against Administering Involuntary Medications to a Defendant During Trial*, 55 VAND. L. REV. (forthcoming Jan. 2002).

338. 52 F.3d 1559 (11th Cir.), *cert. denied*, 514 U.S. 1104 (1995).

339. *Id.* at 1562. The petitioner's answers to these questions were used to supplement the testimony of expert witnesses. *Id.*

340. *Id.* at 1561 (quoting the transcript from the competency hearing).

ing a judge in his ultimate decision, especially if there is conflicting expert testimony based on technical psychological terminology. On the other hand, it is also arguable that such a determination of mental health should be left completely to experts. If the latter is true, then how is the judge to decide among competing experts? The answer probably lies in statutorily defining "incompetency to be executed" with the actual language the judge will hear from the expert witnesses in mind.³⁴¹

4. Evidence of Pre-sentence Mental State

Courts have also struggled with the issue of whether, under a hearing for *present* competency to be executed, evidence of the prisoner's mental state before his or her sentencing should be considered relevant.³⁴² For example, in *Garrison v. State*,³⁴³ the Colorado Supreme Court remanded the case for another competency hearing because the trial judge refused to admit evidence of Garrison's mental state before his sentencing.³⁴⁴ The prisoner offered such evidence not to prove his mental condition at an earlier time, but to shed light on his current mental condition by showing a family history of mental illness, which supported his theory that his present incompetence "was not an 'over night thing,' but rather the logical culmination of a long, drawn-out process of mental deterioration."³⁴⁵ Should such evidence of prior mental illnesses always be admitted in a competency hearing, or only when it is shown to be relevant to the issue of current competency to be executed?

VI. POSSIBLE SOLUTIONS TO THE PROBLEM

A. *The Current Requirement of Mental Health Experts*

Most states, in order to comply with *Ford*, require courts to appoint a panel of doctors once there is a threshold showing of incompetence.³⁴⁶ If the prisoner offers only lay opinions instead of ex-

341. See *infra* Part VI.B.

342. See, e.g., *Garrison v. State*, 378 P.2d 401, 403-04 (Colo. 1963).

343. *Id.*

344. *Id.* at 404.

345. *Id.* at 403; see *Massie v. Woodford*, 244 F.3d 1192, 1198 (9th Cir. 2001) (finding a history of mental problems was inadequate to prove incompetency to be executed).

346. See, e.g., TEX. CRIM. PROC. CODE ANN. § 46.04(f) (Vernon 2001) ("If the court determines that the defendant has made a substantial showing of incompetency, the court shall order at

pert testimony, his or her *Ford* claim is unlikely to succeed.³⁴⁷ In fact, courts tend to rely on nonexpert testimony only if there is some action by the prisoner himself or herself showing that they *are* competent.³⁴⁸ Thus, although the judge makes the ultimate decision in any judicial proceeding,³⁴⁹ she will inevitably be forced to decide between competing expert opinions.³⁵⁰ The experts will, of course, disagree since each side will present mental health experts whose diagnoses aid their own cause. In fact, the basis of the *Ford* plurality's finding that Florida's procedure did not comport with due process was that the lower court's decision was based solely on state-appointed psychiatrists, without allowing the prisoner to offer his own experts.³⁵¹ As a result, the judge typically listens to several expert witnesses, who testify as to their psychiatric determinations, and then decides whom to believe.³⁵²

least two mental health experts to examine the defendant"); *Van Tran v. State*, 6 S.W.3d 257, 269 (Tenn. 1999) ("If, however, the court determines that the prisoner has satisfied the threshold showing, the trial court shall enter an order appointing at least one, but no more than two, mental health professionals from each list submitted by the respective parties."). Those states that do not require such a panel of experts allow one. See, e.g., FLA. R. CRIM. P. R. 3.812(c) (2000) ("The court may do any of the following . . . (2) appoint no more than 3 disinterested mental health experts to examine the prisoner with respect to the criteria for insanity to be executed and to report their findings and conclusions to the court . . . the court may admit such evidence as the court deems relevant to the issues, including but not limited to the reports of expert witnesses"). As a matter of practice, courts in these states do rely on such experts. See, e.g., *Provenzano v. State*, 760 So. 2d 137, 139 (Fla.), *cert. denied*, 481 U.S. 1024 (2000).

347. See, e.g., *Cox v. Norris*, 167 F.3d 1211, 1213 (8th Cir. 1999) (holding that the testimony of fellow inmates as to the petitioner's idiosyncratic behavior was insufficient for a finding of incompetency to be executed); *Rector v. Clark*, 923 F.2d 570, 573 (8th Cir.) (agreeing with the district court that petitioner's three lay witnesses when "juxtaposed" against the testimony of the state's highly qualified experts left them "not impressed"), *cert. denied*, 501 U.S. 1239 (1991); *Schornhorst v. Anderson*, 77 F. Supp. 2d 944, 955 (S.D. Ind. 1999) (holding that the presumption of insanity could not be overcome by affidavit of a clergyman).

348. See, e.g., *supra* notes 178-83 and accompanying text; see also *Fearance v. Scott*, 56 F.3d 633, 640-41 (5th Cir.) (relying not on expert testimony, but the petitioner's own testimony to find that he was competent to be executed), *cert. denied*, 515 U.S. 1153 (1995). Although this seems illogical, it coincides with the presumption of competency based on the fact that the prisoner must have been found competent at trial in order to have been sentenced to death in the first place. See *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring).

349. See, e.g., *Weeks v. Jones*, 52 F.3d 1559, 1562 (11th Cir.) ("While the trial judge gave Weeks every opportunity to present all of the witnesses and evidence that he desired, the judge ultimately had to determine Weeks's competency to be executed."), *cert. denied*, 514 U.S. 1104 (1995).

350. See *supra* Part IV.A (discussing *Coe v. State*).

351. 477 U.S. at 412-13.

352. In *Martin v. Dugger*, the district court discredited the state judge's determination of sanity because he did not actually have all the experts appear before the court. 686 F. Supp. 1523, 1564 (S.D. Fla. 1988). These witnesses are generally found persuasive only if they have personally examined the prisoner by conducting psychiatric tests. See, e.g., *Garrison v. State*, 408 P.2d 60, 62 (Colo. 1965) (holding that a doctor may use some information outside of his own

These requirements set up a pattern of reliance on expert testimony in deciding competency to be executed. The testimony of these experts, however, necessarily consists of the use of psychiatric methods to make a professional opinion as to the prisoner's mental health. Often, the experts do not even make a finding of "competency to be executed," but testify as to some specific mental problem from which the prisoner suffers.³⁵³ The judge is left with the daunting task of translating psychiatric terminology into layman's language of "competency to be executed." In order to make this choice, the judge must ponder obscure medical diagnoses. For example, the trial judge in *Coe v. State* was bombarded by numerous descriptions of the prisoner's mental health problems: "schizophrenic," "dissociative identity disorder," "psychotic," "schizoaffective disorder (bipolar type)," "antisocial personality disorder," "schizotypal personality disorder," "pseudologica fantastica," and "mild dementia of unknown etiology," among others.³⁵⁴ This job is made even more difficult by the specific distinctions about competency as to which mental experts testify.³⁵⁵ These distinctions may result in different outcomes depending on which expert the judge actually understands at the hearing, rather than on which expert's analysis is most rigorous.³⁵⁶

Often, the judge expresses discomfort in making a decision in the face of substantial medical evidence of genuine mental disorders, but still finds competency because the burden of proof is on the prisoner to show his or her incompetence by a preponderance of the evidence.³⁵⁷ For example, in *Billiot v. State*,³⁵⁸ each of the doctors agreed that a person could be schizophrenic and incompetent to be executed, or schizophrenic and competent to be executed.³⁵⁹ The doctors, however, disagreed on which of these situations described

examination, but only if his opinion was not in any manner based on that information); see also Mark A. Small & Randy K. Otto, *Evaluations of Competency to Be Executed: Legal Contours and Implications for Assessment*, 18 CRIM. JUST. & BEHAV. 146, 152-55 (1991) (describing appropriate tests for psychologists to use in determining competency to be executed).

353. See *supra* Part IV.C (discussing *Billiot v. State*).

354. See 17 S.W.3d 193, 201-06 (Tenn. 2000).

355. *Id.* at 219.

356. See *supra* Parts IV.A-C.

357. See, e.g., *Coe*, 17 S.W.3d at 247-48 ("It appears to this Court that Petitioner is suffering from some sort of personality disorder, as attested by the majority of the mental health experts . . . this Court has no choice but to find that Petitioner is competent to be executed.") (emphasis added).

358. 655 So. 2d 1 (Miss. 1995).

359. *Id.* at 4-9. But see *Lowenfield v. Butler*, 843 F.2d 183, 187 (5th Cir.) (quoting a psychologist as stating that, as a paranoid schizophrenic, the prisoner's capacity to understand the death penalty would necessarily be impaired), *cert. denied*, 485 U.S. 1014 (1988).

the prisoner, and the court was forced to choose among witnesses it had accepted as experts.³⁶⁰ This problem is acute considering that the judge is usually a layperson who, despite substantial effort, simply cannot be qualified to evaluate a medical expert's testimony for its scientific validity. The judge is ultimately left deliberating over which expert witness was the most persuasive. The decision, perhaps unintentionally, may well depend on the expert witness's personality, approach, or articulation, rather than on sound medical judgment.

B. Carefully Crafted Statutory Definitions

One possible remedy to this problem is for states to more carefully define "incompetent to be executed" in their statutes.³⁶¹ A legislature, unlike a court, can spend ample time hearing ideas from both legal experts and various medical experts and organizations to come up with a standard that will aid the judge in his or her final legal determination of competency. Such a legislative act would also result in a more uniform application of the standard for competency to be executed, as well as ensure that no incompetent persons are executed. Since judges most often rely on expert testimony to reach their conclusions, one approach would be to use actual medical terminology in the statutory definition. Given the broad range of medical terms, however, it is certainly not possible or desirable to make a list of specific disorders that will qualify for "incompetency to be executed." Nevertheless, a legislature can at least produce a more descriptive definition of what is meant by "understanding" or "awareness."³⁶² In the end, the final decision will still lie in the subjective judgment of a judge.³⁶³ Yet, if the expert witnesses whom the judge hears were given a medical definition of "incompetence" to use in their examination of the prisoner, the judge would be left with less conflicting testimony. Such an approach would not only preserve justice, but the prisoner, the judge, and society as a whole could feel more confident that the principle announced in *Ford* has been upheld.

There might be some problems with this approach, which would, essentially, by statute require judicial dependence on expert psychiatric witnesses. Are these experts making factual findings or

360. *Billiot*, 655 So. 2d at 9.

361. See *supra* Part III for current statutory definitions.

362. For a suggestion, see *infra* at 2489-91.

363. See *Ford v. Wainwright*, 477 U.S. 399, 426 (1986) (Powell, J., concurring).

essentially drawing legal conclusions?³⁶⁴ Should expert witnesses really be the ultimate decisionmakers?³⁶⁵ As noted above, however, courts are already relying substantially on mental health experts. If they are going to do so anyway, then the law should give expert witnesses a clearer definition with which to work. Furthermore, any fear that psychiatrists will take over the role of the judge excludes a lack of confidence in the adversarial system. As the *Ford* plurality held, both parties should be able to offer their own experts and present arguments at a competency hearing.³⁶⁶

Below is a suggestion³⁶⁷ of how a more carefully crafted statutory formulation might be expressed:

- (A) A person shall be found incompetent to be executed if, as a result of a severe mental impairment, he or she does not understand:
 - (1) that he or she is going to be executed;
 - (2) that this execution is imminent;
 - (3) that this execution will lead to his or her death; or
 - (4) the reason the state is executing him or her.

If the preponderance of the evidence demonstrates a lack of understanding of any one of these factors, the execution shall be stayed. The person alleging incompetency shall bear the burden of proving incompetency.

- (B) For purposes of this section, "to understand" shall mean to grasp the meaning of an event or situation and its significance in the same manner as would an average person facing execution.

364. See Paul J. Larkin, *The Eighth Amendment and the Execution of the Presently Incompetent*, 32 STAN. L. REV. 765, 802-03 (1980) (stressing the importance of judicial supervision of psychiatric determinations); Small & Otto, *supra* note 352, at 156 (calling the competency to be executed question a "moral-legal" one that clinicians should avoid answering).

365. See Ward, *supra* note 8, at 76-87. The author explains that if the prohibition against executing the insane is rooted in society's distaste for the death penalty, then the determination of insanity should depend entirely on medical opinion without the addition of a judge or jury. *Id.* at 88. If the rule is based on a retribution theory, however, then a jury should make the determination and psychiatric input should be discouraged. *Id.* at 88-89.

366. 477 U.S. at 412-13 (Marshall, J., plurality opinion).

367. An assistance prong is not included in this formulation, based on the reasons discussed by Justice Powell in *Ford v. Wainwright*. See *supra* note 70 and accompanying text.

If a person understands that execution is imminent and that he or she was found guilty at trial of a crime punishable by death, but he or she does not rationally understand that these two events are causally connected, the person shall be found incompetent to be executed. Mere knowledge or awareness of an impending execution, without a rational understanding of the reasons for it, is not sufficient to find competency to be executed. Evidence from an expert witness that the person is so deluded that he or she simply cannot relate the crime to the punishment is evidence of such lack of a rational understanding. The person need not admit guilt or accept the judgment of the court to be determined competent to be executed. His or her beliefs about what will happen to him or her after death are not relevant to the determination of competency.

- (C) A person sentenced to death is entitled to a judicial determination of his or her competency to be executed if a judge determines that there has been a threshold showing of incompetency. A determination of competency to be executed shall be made at a competency hearing held when the execution is imminent. At this competency hearing, the court shall provide both the prosecution and the defense an opportunity to present expert testimony based on physical examinations, testing, or personal interviews of the inmate, as well as allow for arguments by counsel. The court shall allow up to four (4) mental health expert witnesses to testify for each party.
- (D) For purposes of this section, "imminent" shall mean that the execution is to occur within thirty (30) days from the time of the competency hearing.
- (E) At the judge's discretion, upon a showing by a preponderance of the evidence that the person suffers from a mental disorder that is likely to

become more severe as the time of execution draws near, a supplemental competency hearing shall be held within three (3) days of the date of execution. In the event that the state supreme court hears an appeal of this supplemental competency determination, the execution shall be stayed. If the supreme court affirms a determination of competency, the execution shall proceed within three (3) days from the date of the supreme court's judgment.

- (F) All final determinations of competency to be executed shall be made by a judge, but substantially based on the testimony of witnesses who are accepted by the court as experts in the field of mental health.

C. The Supreme Court Solution

If state legislatures are unwilling or unable to set forth more well-defined standards for determining competency to be executed, then it is time for the United States Supreme Court to finish the task that it began in *Ford v. Wainwright*,³⁶⁸ and give a more descriptive definition of what the Eighth Amendment requires with regard to executing an incompetent inmate.³⁶⁹ Since the rule against executing an incompetent person is based on the Eighth Amendment, and the procedures to determine such competency must comply with the Due Process Clause, action by the Supreme Court would not be inappropriate.³⁷⁰ Although the Court would be unlikely to use scientific terminology, a majority could at least give more than a one sentence standard for defining competency to be executed, especially considering the finality and seriousness of the issue of capital punishment.³⁷¹ As one court succinctly stated, "*Ford*

368. See *supra* Part II.C.

369. The Supreme Court has consistently denied certiorari on cases involving competency to be executed since deciding *Ford v. Wainwright*. See, e.g., *Provenzano v. Moore*, 530 U.S. 1256 (2000); *Medina v. Florida*, 520 U.S. 1151 (1997); *Billiot v. Mississippi*, 516 U.S. 1095 (1996); *Fearance v. Scott*, 515 U.S. 1153 (1995); *Rector v. Butler*, 501 U.S. 1239 (1991); *Lowenfield v. Butler*, 485 U.S. 1014 (1988).

370. See *supra* Part II.C.

371. See *Ford*, 477 U.S. at 422 (Powell, J., concurring). See generally *Donnelly*, *supra* note 7 (describing the Justices' views based on their opinions in past death penalty cases).

v. Wainwright is a precedential quagmire."³⁷² More careful use of the terms "understanding," "awareness," and "knowledge" would be the first step in this standard.³⁷³

The problem with the Supreme Court solution was noted by Justice Powell in *Ford*: "States are obviously free to adopt a more expansive view of sanity in this context than the one the Eighth Amendment imposes as a constitutional minimum."³⁷⁴ Nevertheless, the Supreme Court could define the constitutional minimum standard more carefully and fully, and provide the states with a thoughtful discussion of the issues involved in determining competency to be executed. At the very least, such an approach would result in more uniform standards and applications of those standards among the different states.³⁷⁵

VII. CONCLUSION

The rule against executing an incompetent person is firmly ingrained in the American legal system. The Supreme Court officially adopted this stance in *Ford*, although only Justice Powell's concurring opinion offered a definition of what it means to be incompetent to be executed.³⁷⁶ A majority of states have accepted Justice Powell's single-prong test from *Ford*: whether the inmate understands her impending execution and the reasons for it. Other states have adopted a two-prong test, which includes both Justice Powell's "cognitive" prong, as well as an "assistance" prong requiring that the inmate be able to assist counsel in her own defense. These vague definitions, when applied to actual cases, have proven to be fraught with difficulties.³⁷⁷

372. *Martin v. Dugger*, 686 F. Supp. 1523, 1557 (S.D. Fla. 1988).

373. See *supra* Part V.B.

374. 477 U.S. at 422 n.3 (Powell, J., concurring).

375. See *Rector v. Butler*, 501 U.S. 1239, 1239 (1991) (Marshall, J., dissenting) (describing the issue of the standard for determining competency to be executed as not only unsettled, but also recurring and important); Byers, *supra* note 8, at 365 ("Until the Court directly confronts the issue of defining competence for execution, no uniform standard will exist."); see also Brent E. Newton, *A Case Study in Systematic Unfairness: The Texas Death Penalty, 1973-1994*, 1 TEX. FORUM ON C.L. & C.R. 1, 36-37 (1994) (noting that Justice Blackmun, while in theory supporting the death penalty, became frustrated in his efforts to develop procedural and substantive rules to ensure fairness, finally conceding that "the death penalty experiment has failed." (quoting *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from a denial of certiorari))).

376. 477 U.S. at 422 (Powell, J., concurring).

377. See *supra* Parts IV and V.

Courts generally require a competency determination to be made while the execution is "imminent," but they face significant difficulties in deciding what this term means. This problem is exacerbated by the fact that prisoners can continue until the day of execution to claim that they have become incompetent since the previous competency hearing.³⁷⁸ Courts have also struggled with what level of comprehension the statutes require: understanding, knowledge, awareness, or rational comprehension. When confronted with multiple mental health experts, who each use different medical terms to describe the prisoner's exact mental problems, the judge is left with the unenviable task of reaching a conclusion. How should she apply these medical terms to the common language definition of incompetency to be executed? Does it ultimately come down to which mental health expert made the most appealing presentation at the competency hearing?

This Note suggests that state legislatures help solve these problems by carefully crafting a more comprehensive definition for determining competency to be executed. In the alternative, the Supreme Court should finish what it started in *Ford v. Wainwright*, and provide a definition of competency to be executed that can be applied more uniformly across the country. In the very least, the Court could provide some guidance for judges who are duty-bound to decide whether or not an inmate is executed. Currently, these judges are often left sifting through a medical dictionary in an attempt to translate a psychologist's testimony into a judicial decision and an opinion explaining that decision. A clearer definition of competency to be executed would aid both mental health experts and judges in deciding *Ford* claims.

There is no question that this issue is of paramount importance. Time should be spent to ensure that the rule against executing the insane is being applied properly in actual cases. State legislatures and the Supreme Court owe such an effort not just to prisoners facing death, but to a society yearning for a restored conscience.

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378. *Ford*, 477 U.S. at 429 (O'Connor, J., dissenting).

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